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No. 88-281

FILED
SEP 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

—v.—

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court review the Second Circuit's affirmance of the discretionary decision not to certify a class in this action, where that decision was based on a failure of proof—specifically, petitioners' failure to satisfy the court that their application for class certification complied with the requirements of Fed. R. Civ. P. 23(a), as required by *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982)?

2. Should this Court review the denial of class certification in light of *Watson* v. *Fort Worth Bank & Trust*, ____ U.S. ____, 108 S. Ct. 2777 (1988), even though (a) *Watson* did not change the standard for obtaining class certification articulated in *Falcon*, and (b) the sole issue addressed in *Watson*—namely, whether claims of subjective discrimination can be analyzed under the so-called "disparate impact" model—was raised by petitioner in the District Court but abandoned on appeal?

List of Parties and Rule 28.1 List

The parties are listed in the petition. Respondent Purolator Courier Corp. ("Courier") is a wholly owned subsidiary of Emery Air Freight Corp.

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BRIEF IN OPPOSITION

Preliminary Statement

In *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), this Court held that it was not appropriate to certify a class in a Title VII case unless the named plaintiffs satisfied the trial court, after rigorous analysis, that they shared common claims of discrimination with an identifiable class of similarly situated persons.

In this Title VII case, the United States District Court for the Eastern District of New York, after reviewing the meager and

unpersuasive evidence presented by petitioners in support of their motion for class certification, ruled that petitioners had not met their burden under *Falcon* and declined to certify a class. On appeal, a panel of the United States Court of Appeals for the Second Circuit examined the same evidence and decided that the District Court's assessment of that evidence was not clearly erroneous. The Court of Appeals therefore ruled—unanimously—that the District Court had not erred in denying the class certification motion.

Petitioners now ask this Court to review—for a third time—whether their evidence was sufficient to sustain their burden under *Falcon*. To put it in petitioners' own words, they ask this Court to find that, "[t]he District Court committed clear error and abused its discretion" by not certifying a class, and that, "[t]he Second Circuit erroneously disregarded . . . highly probative evidence" in affirming that decision. (Pet. 6)

This Court, however, sits to decide questions of federal law that raise novel, general or important issues. It does not exercise its jurisdiction to review findings of fact that relate solely to an individual case. Indeed, as described in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), this Court is "a court of law . . . rather than a court for correction of errors in fact finding, [and] cannot undertake to review the concurrent findings of fact by two courts below . . . ." Under this long-established principle, nothing presented by this case is worthy of review by this Court.

Petitioners also assert that certiorari should issue because the denial of class certification is inconsistent with this Court's recent decision in *Watson* v. *Fort Worth Bank & Trust*, ____ U.S. ____, 108 S. Ct. 2777 (1988), in which allegations that subjective employment practices are discriminatory were deemed amenable to analysis under the "disparate impact" model. But the propriety of certifying a class in this particular case presents no issue that warrants further review in light of *Watson*, because *Watson* did not modify the standards for class certification established by this Court in *Falcon* for all class

actions, whether brought under a disparate impact or disparate treatment theory.

Moreover, while the District Court rejected petitioners' argument that subjective employment practices could be analyzed under the disparate impact model, petitioners abandoned that argument when they took their appeal, as the Court of Appeals specifically noted. (App. 6)[1] This Court customarily declines to review questions that were not presented to the Court of Appeals; the fact that the issue was raised and then abandoned only reinforces the propriety of not making an exception to that rule in this case.

Statement of the Case

In February 1982, Patricia Sheehan and Elizabeth Henoch, along with a third plaintiff,[2] filed a class action under Title VII, 42 U.S.C. § 2000(e). They alleged that Courier had discriminated against them and other women on the basis of their sex in job assignment, pay, fringe benefits, promotion and transfer and had retaliated against them for filing discrimination charges with the EEOC.

Each of the three plaintiffs had unique jobs at Courier. (App. 58-59, 64) They were all highly successful, well-paid employees. (App. 53, 59, 64) Two of the plaintiffs—Sheehan and Henoch—were officers of the company. The third was the senior regional manager of Courier's Chicago terminal and one of the highest paid managers—male or female—in Courier's field operations. (App. 64)

Proceedings Below

District Court Decisions

On March 23, 1983, petitioners moved for class certification. After extensive discovery and briefing, the motion was denied by the District Court on December 26, 1984. (App. 35)

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1 Appendix references are to the petition appendix unless otherwise noted.

2 The third plaintiff, Kayhan Hellriegel, entered into a stipulation with Courier dismissing her complaint with prejudice.

The trial court articulated two bases for its decision.

First, the District Court held that petitioners failed to show that an aggrieved class of similarly situated persons existed, as required by *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982). Although petitioners introduced what they referred to as "significant proof that [Courier] operated under a general policy of discrimination," *Falcon*, *supra*, 457 U.S. at 159, n.15, in support of their class certification motion, the District Court concluded that the evidence did not amount to "significant proof" of anything.

The court ruled that the statistical evidence (including regression analyses) submitted by petitioners in support of their motion was fundamentally flawed because it did not "offer the relevant comparison of *similarly situated* female and male employees (i.e., females and males with the same qualifications and experience). . . ." (App. 52) (Emphasis added)

In light of the defects in petitioner's statistical evidence, the non-statistical evidence about similarly aggrieved women that they introduced to bring "the cold numbers convincingly to life," *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977), assumed great importance. (App. 52) The District Court, however, found that evidence to be both inadequate and unpersuasive. It held that an affidavit from one member of the proposed class and a list of employees who had filed discrimination complaints against Courier—only three of whom would have been members of the proposed class—did not establish a class of aggrieved employees that bore "some statistically significant relationship to the size of the relevant parts of the employer's work force." (App. 50, citing *Falcon* at 457 U.S. 157-158)[3]

In the alternative, the District Court concluded that class certification was not warranted because petitioners, with their unique jobs and high ranking status, were atypical of the broad

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3 The proposed class consisted of approximately 315 women, constituting all women in jobs categorized as "exempt," no matter what job they held. (App. 50)

class they sought to represent. (App. 54-59, 61-67)[4] The District Court judge acknowledged that a narrower class of high ranking women employees might have been appropriately certified, but noted, "[pl. intiffs have not articulated any basis for defining such a class." (App. 68-69)

After class certification was denied, petitioners pressed their individual claims at an eight-day trial, following which the District Court entered judgment in favor of Courier. (App. 22) The trial court, sitting as fact-finder, found that petitioners had failed to carry their burden of proof on any of their individual claims of discrimination. That court described petitioners' evidence as "unpersuasive," "lack[ing] merit" and "not credible." (App. 22-33)

Petitioners introduced at trial the same flawed statistics that had been submitted and found wanting on the motion for class certification. They offered this evidence both in support of their individual claims and in support of a renewed request for class certification, which was made during trial. The District Court again held that the statistics proved nothing, this time remarking that the "statistical evidence is not persuasive because it does not take into account non-discriminatory variables that explain disparities in pay." (App. 25)

Court of Appeals Decision

The Second Circuit Court of Appeals issued its opinion affirming the judgment on February 12, 1988.

The panel unanimously affirmed the District Court's denial of class certification. The Court of Appeals held that the District Court had not erred in denying class certification, because petitioners failed to present "class-wide proof of an aggrieved class" as required by *Falcon*. (App. 7)[5]

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4 Job categories within the proposed class included positions as diverse as officers and professionals, on the one hand, and customer service representatives and secretaries, on the other. (App. 57)

5 The Court of Appeals did not reach the alternate ground relied on by the District Court in denying class certification; namely, that petitioners were atypical of the class they wanted to represent. (App. 7)

In the view of the Court of Appeals, the District Court was not clearly erroneous in finding petitioners' statistical evidence not probative of whether petitioners satisfied the requirements of Fed. R. Civ. P. 23(a), because "[t]he regression analysis did not take into account various relevant non-discriminatory factors, such as education and prior work experience." (App. 9) The Court of Appeals observed that Courier had presented evidence which showed that such factors could explain any disparities between men and women to which petitioners pointed. (App. 9)

The Second Circuit also affirmed the District Court's conclusion that petitioners' "limited amount" (App. 9) of anecdotal evidence about the existence of a class was insufficient to support certification of a class. Reviewing the particular pieces of evidence, the Court of Appeals agreed with the District Court that a list of employees who had filed charges against Courier with the EEOC (only a few of whom were even members of the putative class) "had little probative value." (App. 9) It also affirmed the District Court's finding that a single affidavit from only one potential class member out of a proposed class of 315 members "was insufficient to establish a class of aggrieved individuals" under Rule 23(a). (App. 9) Finally, the Court of Appeals noted that statements from outdated personnel manuals that petitioners had introduced did not establish that there existed a class of similarly situated women with grievances similar to theirs because the manuals "were not in effect at corporate headquarters," where petitioners worked. (App. 9)

By a 2-1 vote, the Court of Appeals also upheld the District Court's decision to dismiss petitioners' individual claims, ruling that the findings of fact made by the District Court with respect to those claims were also not clearly erroneous. (App. 16) Judge Kearse dissented from the decision to affirm the judgment dismissing the individual claims, on the sole ground that she would have accorded more weight to certain non-statistical evidence presented at trial. (App. 17-21)

On April 13, 1988, petitioners' request for a rehearing was denied by the Court of Appeals.

On August 15, 1988, respondents received the petition for a writ of certiorari. Petitioners sought review only of the Court of Appeals' unanimous affirmance of the decision denying class certification. They did not ask this Court to review the dismissal of their individual claims.

Reasons for Denying the Writ

I.

THIS CASE PRESENTS NO QUESTIONS OF GENERAL IMPORTANCE WARRANTING REVIEW BY THIS COURT

A. Petitioners Are Seeking Review of Affirmed Findings of Fact, Which is Not the Province of This Court

The Court of Appeals did not decide in this case any important question of federal law that requires further review. There is no conflict among the circuits on any point that needs to be resolved. Nor does this matter raise any novel, general or important legal issue. The Court of Appeals held only that the District Court did not clearly err when it found that petitioners had failed to meet their evidentiary burden of proving that a class of similarly aggrieved women existed, and, hence, that class certification was unwarranted. That ruling, which is of no moment to any case but this one, hardly raises an issue worthy of certiorari. *Layne & Bowler* v. *Western Well Works*, 261 U.S. 387, 393 (1923) (Supreme Court will not review a case unless it involves principles of public importance).

That the named plaintiffs in a Title VII case must convince a court that they are proper representatives of a defined class as a prerequisite to obtaining class certification has been settled ever since this Court recognized that

> . . . the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified. Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a

> promotion on discriminatory grounds, and his otherwise unsupported allegation that the Company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For respondent to bridge that gap, he must prove much more than the validity of his own claim.

Falcon, *supra*, 457 U.S. at 157. To bridge that gap, any putative class representative in a Title VII case must demonstrate that he or she and others share grievances against their employer that arise out of common questions of law and fact. *Id.* at 158. Only "if the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied" may it certify a Title VII class. *Id.* at 161.

Petitioners do not contest the proposition that the District Court and Court of Appeals were bound to follow *Falcon* in this case. What petitioners do challenge is the District Court's holding, affirmed by a unanimous Court of Appeals, that class certification was appropriately denied because the evidence they presented in support of their motion for class certification did not suffice to bridge the gap identified in *Falcon*.

Before denying class certification, the District Court engaged in the rigorous analysis required by *Falcon*. It rested its decision squarely on factual findings that were thereafter reviewed by the Court of Appeals and found not to be clearly erroneous. Petitioners recognize this. The petition frames the issue raised by the case as follows: "The District Court committed clear error and abused its discretion in failing to recognize that subjective decisions at Purolator were being made in a highly sex-biased atmosphere and by officers and supervisors with company mandated sex-biased directives. The Second Circuit erroneously disregarded this highly probative evidence." (Pet. 6) In page after page of the petition, petitioners catalogue the

evidence that allegedly proves their point—never once pointing to the rebuttal evidence that the trial court found more convincing, and never once alluding to the actual findings of fact (including credibility findings) that were made and affirmed below.

But this Court, unlike petitioners, does defer to factual determinations in which the District Court and Court of Appeals have concurred. It has repeatedly held that it will not review such findings. *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenji* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967). And where, as here, there is no dispute that the lower courts correctly followed controlling legal precedent in making and reviewing those factual findings, there is no basis for further review by this Court.

B. Petitioners' Attacks on the Decisions Below Under *Eisen* and *Bazemore* Do Not Raise Issues Worthy of Certiorari

In an attempt to mask their request for further review of the District Court's factual findings, petitioners also assert that the lower courts committed two errors of law which require certiorari. The assertion is baseless.

Petitioners first argue that the decisions below run afoul of this Court's opinion in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). According to petitioners, the lower courts, in contravention of *Eisen*, required them to prove the merits of their claims of discrimination in order to obtain class certification. That is simply not the case.

Under *Eisen*, a court cannot hold a hearing on the ultimate merits of the claim to determine whether to certify a class. But as this Court has observed in several post-*Eisen* decisions, "[t]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978), cited in *Falcon*, *supra*, 457 U.S. at 160. The Court has never suggested that this enmeshing of

issues either contravenes *Eisen* or places an impossible burden on putative class plaintiffs.

Here, neither the District Court nor the Court of Appeals held, or even suggested, that petitioners were required to prove the merits of their class claims in order to obtain certification. The lower courts only required, in accordance with *Falcon*, that petitioners satisfy the court that the prerequisites of Rule 23(a) had been met. That petitioners chose to do so by offering what they contended was "significant proof" of Courier's discriminatory practices—evidence that was necessarily "enmeshed in the factual and legal issues" raised by their complaint—is of no moment. The District Court evaluated that evidence and found it insufficient to bridge the *Falcon* gap. That does not run afoul of *Eisen*; it does not even implicate *Eisen*.

Second, petitioners allege that the Court of Appeals erred in not overturning the denial of class certification because the District Court failed to consider petitioners' statistical evidence, as required by *Bazemore* v. *Friday*, 478 U.S. 385 (1986). As the Second Circuit held on appeal, this argument has no merit.

As petitioners read *Bazemore*, the trial court was required to find that they had discharged their burden under *Falcon* simply by offering statistical evidence to support their claim that other women had grievances similar to theirs—no matter how defective those statistics might be. That, of course, is not what *Bazemore* says. All *Bazemore* holds is that a court may not *ignore* statistics simply because they do not control for all relevant variables. This Court also recognized in *Bazemore* that the failure to include all relevant variables would necessarily affect the weight accorded to statistical evidence. *Id.*, 478 U.S. at 400. And in a post-*Bazemore* Title VII decision, Justice O'Connor observed, "courts or defendants [are not] obliged to assume that plaintiffs' statistical evidence is reliable. 'If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.' " *Watson*, *supra*, 108 S. Ct. at 2789. *See also Teamsters*, *supra*, 431 U.S. at 340 ("[S]tatistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may

be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.")

That is precisely what happened here. The District Court did not ignore petitioners' statistics. That evidence was part of the record, both on the motion for class certification (App. 50-51) and at trial (App. 25, 30), and it was discussed in both lower court opinions. Contrary to petitioners' assertion (Pet. 13), the statistical evidence was controverted; Courier introduced unrebutted evidence which showed that elementary nondiscriminatory factors, such as education, prior job experience and job level, could (and did) explain any disparities in pay between men and women employees at Courier. (App. 9) Petitioners failed to control for those basic factors in their statistical analyses. (App. 8-9)

Obviously, the District Court, after rigorous analysis, found Courier's countervailing evidence more persuasive than petitioners' seriously flawed statistics, and its conclusion was affirmed by the Court of Appeals as not clearly erroneous. Such a finding, as the Court of Appeals held, does not run afoul of *Bazemore*. (App. 8-10)

Thus, petitioners cannot identify *any* error of law that was committed by the Court of Appeals, let alone an error of law that qualifies as worthy of certiorari under Rule 17 of the Supreme Court Rules. There is, therefore, no ground for this Court to review the decision below.

II.

WATSON V. *FORT WORTH BANK & TRUST* DOES NOT REQUIRE THAT THIS COURT REVIEW THE DENIAL OF CLASS CERTIFICATION

A. *Falcon*, Not *Watson*, Controls The Propriety of Class Certification

Petitioners also argue that certiorari should issue to review the decision denying class certification because the District Court held that the purely subjective employment practices at issue in this case could not be analyzed under the disparate impact model as well as the disparate treatment model. That holding, petitioners argue, does not accord with this Court's recent decision in *Watson* v. *Fort Worth Bank & Trust*, ____ U.S. ____, 108 S. Ct. 2777 (1988).

The flaw in petitioners' argument is that *Watson* did not concern class certification or anything related to class certification. It is *Falcon*, not *Watson*, that outlines the burden a putative class plaintiff must assume in order to obtain class certification. That burden is no different in disparate impact cases than in disparate treatment cases—to bridge the gap between individual and class claims by satisfying the court, after rigorous analysis, that the prerequisites of Rule 23(a) have been complied with. Nothing said in *Watson* alters that settled principle of law. Indeed, the *Watson* Court specifically declined to address any questions other than whether disparate impact analysis could apply to a subjective promotion system. *Id.* at 2791. Thus, there is no support for petitioners' assertion that *Watson* rendered the decision denying class certification erroneous in any respect.

Further misreading *Watson*, petitioners suggest that *Falcon* has minimal or no relevance in disparate impact cases. (Pet. 9) However, that is clearly not correct. In *Falcon*, the class certified contained members who had disparate impact claims as well as disparate treatment claims. *Falcon*, *supra*, 457 U.S. at 154. This Court overturned certification of the class on the ground that the lower courts had failed to require the named

plaintiff to prove that the case satisfied the requirements of Rule 23(a). At no point did the Court suggest that its discussion of the burdens imposed on putative class plaintiffs by Rule 23(a) applied only when disparate treatment complaints, rather than claims of disparate impact (whether objective or subjective), were involved. And no subsequent decision of this Court—including *Watson*—has so held.

But even assuming that *Watson* had some relevance on the question of class certification, certiorari would still be inappropriate, because the findings of the District Court, as affirmed by the Court of Appeals, demonstrate conclusively that no class could be certified under *any* theory.

As the *Watson* plurality noted, the burden on a plaintiff seeking to prove that subjective employment practices had a disparate impact on a class of employees is not met as easily as in a case involving facially neutral practices, such as height requirements or intelligence tests. The plaintiff must both identify the specific employment practice that is challenged and then offer statistics "of a kind and degree sufficient to show that the practice in question" has resulted in the exclusion of those in a protected group from some job benefit, such as employment or promotion. *Watson* at 2777-78. Further, courts and defendants are not "obliged to assume that plaintiffs' statistical evidence is reliable. 'If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.' " *Watson* at 2789.

That is precisely what happened here. Respondents established, to the satisfaction of both courts below, that the statistics offered in support of petitioners' motion for class certification were so fallacious and deficient as to prove nothing because:

1) they failed to offer comparisons between similarly situated men and women (App. 9, 52); and

2) they failed to control for the most elementary nondiscriminatory factors that can account for differences in treat-

ment among employees, such as education and prior work experience. (App. 9, 25)

Nothing in *Watson* suggests that such patently defective statistics would be any more acceptable as evidence that a disparate impact class exists than they were under the disparate treatment model. Indeed, the plurality's recognition of the need for rigorous statistical proof in a disparate impact case involving subjective decisions compels the conclusion that the class certification decision would have been the same if this had been analyzed as a disparate impact case from the beginning.

Relying on extensive quotations from Judge Kearse's dissent, petitioners also assert that their non-statistical evidence alone would be sufficient to guarantee certification of a class under the disparate impact theory. But nothing in *Watson* suggests that the minimal and largely irrelevant anecdotal evidence rejected by the courts below would be sufficient, in and of itself, to certify a class under the disparate impact model.

Moreover, petitioners' reliance on Judge Kearse's dissent is misplaced, inasmuch as she was concerned solely with evidence she thought should have been given more weight by the District Court in deciding petitioners' *individual* claims. As petitioners recognize, (Pet. 5) Judge Kearse joined the majority in affirming the District Court's denial of class certification. Even Judge Kearse did not believe petitioners' anecdotal evidence was sufficient to warrant class certification.

In sum, *Watson* neither vitiates a plaintiff's burden of proving the existence of a class under *Falcon* nor endows evidence as flimsy as that introduced by petitioners with sufficient probative value to sustain that burden. Thus, petitioners' reliance on *Watson* is misplaced.

B. Petitioners Cannot Raise The Disparate Impact Issue Here Because They Abandoned It On Appeal

In any event, petitioners are in no position to invoke *Watson* here because, while they raised the disparate impact issue in their motion for class certification, they abandoned it on appeal. (App. 46)

Petitioners assert that the District Court's ruling on the disparate impact question was affirmed by the Court of Appeals. (Pet. 9) It was not. The briefs submitted to the appellate court by petitioners make no mention of the issue (Courier's App. 1a-88a), and the Court of Appeals took pains to note that the District Court's ruling on the question "has not been challenged on appeal." (App. 6)[6]

This Court has repeatedly held that it will not normally consider an issue that was not considered by the Court of Appeals. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967).

Petitioners obviously believe that, in light of *Watson*, this Court should invoke an exception to this well-established rule. However, there is no reason to depart from customary practice in this case. Only in exceptional cases will this Court consider an issue that was not raised in the Court of Appeals; this case hardly qualifies as exceptional. And where the petitioner (like

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6 The Court of Appeals stated: "The court analyzed the case as one of disparate impact, requiring proof of discriminatory motive. This finding has not been challenged on appeal." (App. 6) It is obvious, both from reading the District Court's decision and from the Court of Appeals' reference to discriminatory motive (which only comes into play in disparate treatment cases) that the word "impact" should be "treatment." Petitioners recognize this. (Pet. 17 n.6) It is equally clear from context that this error is far more likely to be the result of careless proofreading than some misunderstanding of the law, as petitioners suggest.

petitioners here) has expressly waived reliance on a particular issue on appeal, this Court will not consider that issue on certiorari, even in cases where the Court has addressed a previously unsettled point of law in a supervening opinion. *Helvering* v. *Wood*, 309 U.S. 344, 349 (1940). (Supreme Court declined to consider an issue when petitioner specifically waived reliance on that issue in the Court of Appeals, even though, under opinion announced in a companion case, *Helvering* v. *Clifford*, 309 U.S. 331 (1940), petitioner would have prevailed on the merits.)

Attempting to avoid the impact of their waiver, petitioners apparently suggest that they should be excused from their failure to press their disparate impact argument on appeal in this case because the Second Circuit had already rejected the identical argument in a prior case. *Rossini* v. *Ogilvy & Mather, Inc.*, 798 F. 2d 590 (2d Cir. 1986). (Pet. 5 n.2, 9 n.3) Such a contention is unpersuasive for two reasons.

First, the Second Circuit in *Rossini* did not even consider the question that petitioners failed to preserve here—whether disparate impact treatment for subjective employment practices would affect the propriety of certifying a class in a Title VII case. Thus, petitioners could not rely on the decision in *Rossini* to excuse their failure to raise the issue, even if the pendency of an adverse decision would otherwise have vitiated their waiver—which it would not.

Second, petitioners' failure to preserve their disparate impact argument is particularly inexplicable in light of the fact that the issue was the subject of conflict between the circuits; indeed, petitioners' counsel (who were, coincidentally, counsel in *Rossini*) made that very point to the Second Circuit in *Rossini*. *Id.*, 798 F.2d at 605. And this court granted certiorari in *Watson* to resolve that conflict a mere three weeks after the District Court announced its decision in this case, which was well before the instant appeal was perfected. *Watson* v. *Fort Worth Bank & Trust Co.*, *cert. granted*, ____ U.S. ____, 107 S. Ct. 3227 (June 22, 1987). Petitioners could have apprised the Second Circuit of the pendency of *Watson* and, if they deemed the case important or relevant here, they could even have moved for a stay of pro-

ceedings in the Court of Appeals pending the decision in *Watson*. That they chose not to do so, thereby depriving this Court of the Second Circuit's views on the question they now propound, speaks volumes about the irrelevance of *Watson* to the issue of class certification in this case.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: New York, New York
September 13, 1988

Respectfully submitted,

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No. 87-7540

United States Court of Appeals

FOR THE SECOND CIRCUIT

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

—against—

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLANTS' BRIEF

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ISSUES PRESENTED

1. Whether the District Court erred in its class certification decision in requiring affidavits from class members when plaintiffs presented substantial evidence of defendants' discriminatory policies, discriminatory attitude and statistical evidence of discrimination.

2. Whether the District Court erred in holding that the plaintiffs were inadequate class representatives.

3. Whether the District Court clearly erred in finding that plaintiffs did not suffer from discrimination, when it failed to consider the discriminatory atmosphere at Purolator and the sex-biased attitude of defendants' officials, and when it improperly rejected plaintiffs' statistical evidence.

4. Whether the District Court's findings of no retaliation against Sheehan and Henoch are clearly erroneous.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 87-7540

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Defendants-Appellees.

STATEMENT OF THE CASE

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), by plaintiffs Patricia Sheehan ("Sheehan"), Elizabeth Henoch ("Henoch") and Kayhan Hellriegel ("Hellriegel"), on behalf of themselves and a proposed class of female exempt (salaried) employees and former employees of Purolator Courier Corporation and Purolator Inc. ("defendants"/"Purolator"). The Complaint generally alleged that defendants unlawfully discriminated against plaintiffs, and the class of women they sought to represent, in assigning them to lower paying, lower status positions, in promotion and transfer opportunities and in the payment to them of lower salaries and other benefits than those given to similarly-situated males. In addition, plaintiffs Sheehan and Henoch asserted that they were retaliated against for having filed charges of discrimination. *See* Title VII, 42 U.S.C. [2] § 2000e-3(a). Plaintiffs requested injunctive relief and monetary compensation for back pay and other benefits lost by them and by members of the proposed class as a result of the defendants' unlawful practices.

In March, 1983 plaintiffs moved, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, for class certification.[1] That motion was denied by the Hon. I. Leo Glasser in December, 1984. The Court's decision is reported at 103 F.R.D. 641. After the class certification motion was denied, Hellriegel and Purolator entered into a settlement agreement resolving all of her claims.

The claims of discrimination and retaliation[2] alleged by plaintiffs Sheehan and Henoch were tried to the Court from June 24 through July 3, 1985. The District Court issued its decision on May 27, 1987, dismissing all of plaintiffs' claims. That decision is unreported. (*See* J.A. 3224-38). Plaintiffs renewed their motion for class certification at the conclusion of the trial on the merits (J.A. 3152-53) and, although in its decision on the merits the District Court acknowledged that [3] plaintiffs' renewed motion was pending, it did not comment on it further. (*See* J.A. 3224-38). Judgment was entered on June 2, 1987. On June 30, 1987, plaintiffs Sheehan and Henoch appealed from all adverse opinions and orders of the Court below. (J.A. 3240-41).

SUMMARY OF ARGUMENT

Plaintiffs appeal from the denial of their motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure and from the dismissal of their individual claims, which alleged sex discrimination in the terms and conditions of their

---

1 Many months of discovery, at large expense to plaintiffs, were wasted in resisting defendants' motion to dismiss the complaint as against Purolator, Inc. Well after all papers were filed on the class certification motion, Purolator, Inc. and Purolator Courier announced consolidation of their headquarters and that the executive officers of Purolator, Inc. were assuming responsibility for their respective functions at Courier. This made *de jure* what plaintiffs had asserted was the fact at an earlier time. (*See* Joint Appendix 1199-1200; "J.A. _____").

2 This District Court earlier denied defendants' motion for summary judgment with respect to Sheehan's retaliation complaint. 36 FEP Cases 1449 (1982). This case was before this Court in 1981 when the Court reversed the District Court's holding that it was without jurisdiction to hear Sheehan's retaliation claim. 676 F.2d 877 (1981).

employment, and retaliation for having complained of discrimination.

In its analysis of plaintiffs' application for class certification, the Court below ignored plaintiffs' factual showing and made fundamental errors of law in applying *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982). These errors resulted not only in the incorrect initial denial of the motion, but also permeated the Court's erroneous assessment of the merits of the individual plaintiffs' claims. The District Court's failure to consider or rule on the renewed motion for class certification in its final opinion is inexplicable and in disregard of the additional evidentiary support for the motion developed on trial. It also is contrary to controlling decisions of this Court and the United States Supreme Court issued after the trial, but before issuance of the Court's opinion and order of May 27, 1987. *See Bazemore v.* **[4]** Friday, 478 U.S. ____, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986); *Rossini v. Ogilvy & Mather*, 798 F.2d 590 (2d Cir. 1986).

The Court's rulings not only disregard the requirements of Rule 23(c)(1), but also reject *sub silentio* the express admonition of this Court in *Rossini* that "the primary thrust of *Falcon* was that satisfaction of Rule 23(a) requirements may not be *presumed*" and that the Supreme Court in *Falcon* "did not hold that a plaintiff asserting one particular type of claim can never represent a class of employees asserting other types." 798 F.2d at 597 (emphasis in original). In addition, had the District Court applied *Bazemore*, 92 L.Ed.2d at 329-33, to the statistical evidence, it would have been obliged to credit plaintiffs' proof both for purposes of class certification and liability.[3]

---

3 The Court's failure to address *Rossini* is even more baffling in view of the citation to it in an opinion issued by the same Court less than two months after it issued its final opinion in this case, in which the Court granted class certification on allegations similar to those herein. *See AFSCME v. County of Nassau*, ____ F.Supp. ____, 44 FEP Cases 583, 586 (E.D.N.Y. 1987). Applying the law as it was set forth in *AFSCME*, *id.* at 585-86, the Court could not have denied plaintiffs' motion for class certification here. There, the Court, in what it deemed a disparate treatment case

The Court below misapprehended the law, and its obligations under Rule 23(c)(1), in the following critical respects:

1. The Court ruled that, since *Falcon*, class representatives are required to supply affidavits from class members to demonstrate not only the "existence of an aggrieved class", but also that other class members "feel aggrieved" in order to show typicality. 103 F.R.D. at 648-49. In so doing, the Court erroneously required what in effect was an opt-in procedure.

[5] 2. The Court, ignoring the facts and prevailing law, found that Sheehan, Henoch, and Hellriegel could not represent a class of all female exempt employees because they occupied "relatively high level" positions. 103 F.R.D. at 650, 653, 655.

3. The Court ruled that Sheehan, Henoch and Hellriegel could not be proper class representatives because they asserted that they had suffered unlawful retaliation, *in addition to* their class wide claims of discrimination in compensation, promotion, and other conditions of employment. 103 F.R.D. 652, 653-54, 656.

The District Court also made far-reaching and fundamental errors in evaluating the evidence before it, at both the class certification and trial stages of the litigation. The Court committed clear error and abused its discretion in failing to recognize that decisions were being made in a highly sex-biased atmosphere and by officers and supervisors with company mandated sex-biased directives. Thus,

1. The District Court *never* mentioned Purolator's blatantly sex-biased written policies, which were distributed to all officers of the company and "to all managers within the field organization, terminal mangers, [and] those people having direct day to day responsibility for running the operations," and which were issued in 1971, renewed in 1975, and not withdrawn until

---

of salary discrimination, certified a class of all female Nassau County civil service employees who were employed in traditionally female jobs (those having 70% or more females).

shortly before trial in 1983 or 1984. (J.A. 2101-02, 2106; E.A. 1). Those policies and interperations included:

> (a) An express belief that "[t]he sex of the individual is more often related to job success than one might expect." (Exhibit Appendix 1; "E.A. ____"). "The sex of the employee is often related to turnover." (*Id.*)
>
> (b) An admonition that the amount of responsibility an employee may be allowed to assume should be related to the number of dependents. Specifically, "[i]n the case of women applicants, the number and ages of children are important." Managers and supervisors also are directed to determine how the children are to be cared for while the "mother" works. (*Id.*)
>
> (c) An express preference for promoting men by instructing managers and supervisors that, "before deciding on a man for promotion" consider such highly subjective criteria such as the candidate's "heat **[6]** resistance" and loyalty because "being loyal to the Company . . . . is a quality of *men* who are responsible for the success of its operation." (J.A. 726) (emphasis added).

The District Court also ignored testimony that showed the sex-biased attitude of Purolator officials:

2. The District Court erroneously ignored an admission by Sheehan's supervisor that he did not take her request for transfer seriously because he knew she had children. (J.A. 2203). This testimony not only demonstrated the biased attitude of her supervisor, but also showed that he took seriously and implemented the express policy that women with children were not to be given responsibility within Purolator.

3. It was erroneous for the District Court to ignore the testimony of a former male manager that he was told to pay women low salaries because they had husbands, and that based upon his management experience within Purolator, he observed women were paid less than their male counterparts, and that it was more difficult to get promotions or salary increases for women than for men. (E.A. 362-63, 365-66, 394, 399).

4. The District Court erroneously refused to allow a witness to testify at trial that John Delany ("Delany") (both Henoch's and Sheehan's supervisor) told her she would not be considered for a position because no one would be respectful of a woman in that position. (J.A. 2524-25).

5. The District Court completely ignored testimony supporting Purolator's former affirmative action officer that Purolator only paid lip service to affirmative action (E.A. 125; J.A. 2174-77), including the written admission that women in Purolator's work force are underutilized as officials and managers (E.A. 3) and that Purolator's affirmative action deficiencies disqualified it for certain government contracts. (J.A. 2277-79)

6. The District Court erroneously rejected plaintiffs' statistics in *toto* on the ground that plaintiffs' regression analysis, which included all exempt employees, did not have variables for education and prior experience, even though defendant's expert testified that he could not state what effect, if any, including those variables would have on the results—and defendants offered no study of all exempt employees although it had the data available to do so.

These errors, independently and cumulatively, so tainted the District Court's evaluation of plaintiffs' case as to require reversal and vacation of both the class certification [7] decision and the decision on the merits. Both Sheehan's and Henoch's individual claims were unfairly burdened by the Court's erroneous class certification determination. As the Fifth Circuit noted in *Duke v. University of Texas at El Paso*, 729 F.2d 994, 997 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984), "had [plaintiff's] class claims prevailed, she would have faced a distinctly less onerous burden at the trial of her individual claim." *See also Rossini*, 798 F.2d at 606. Findings in favor of the class would have simplified plaintiffs' proof in the individual claims and shifted the burden of proof to Purolator on their claims. *See Teamsters v. United States*, 431 U.S. 324, 362 (1977).

FACTS

Work Force Distribution

Purolator is engaged in the business of providing courier service over ground and air routes. Of the 1,113 salaried employees in 1982, 798 were male and 315 female; women thus comprised approximately 28% of defendants' exempt (salaried) work force. (J.A. 727).[4] In Corporate Headquarters, of 109 salaried positions, 34 were occupied by women (31%); in the Eastern division, of 482 salaried employees, 155 were women (32%); in the Western division, of 240 salaried employees, 67 were women (28%); and the Southern division, 57 of 264 salaried employees were women (22%). (J.A. 727-28)

[8] The women represented in Purolator's exempt work force were at the lowest levels and in a few job categories: in 1982, there were 39 officers, of whom only two were women; of 32 directors, only one was a female; there were no female senior managers, and of the 222 managers, only 31 were female. (J.A. 729). Almost one-half of the male exempt employees were in the high salaried, upper level ranks; about one-fourth of the women were at those levels. (*See id.*)

Purolator admitted that it underutilized women in managerial, professional, and sales areas. (E.A. 3). It was also shown that from 1976 forward, 60% to 88% of all exempt job titles were sex segregated. (J.A. 730).[5] The facts were confirmed by plaintiffs' unchallenged statistical analysis, which showed that there was a statistically significant underrepresentation of

---

4 Plaintiffs sought to represent a class comprised of defendants' female exempt employees. The facts provided herein are derived from the record the District Court had before it for initial determination of the Rule 23 motion and after trial.

5 There are no jobs in Purolator that require male only/female only assignments. Purolator has a promote from within policy, and as Paul Wolfrum, a Senior Vice President testified, a high school education, "with experience" was sufficient qualification for most jobs. (J.A. 2860).

women in Purolator's exempt work force, when compared with a census-derived nationally qualified work force. (E.A. 110).[6]

Criteria Used In Personnel Decision Making

The District Court was provided with, and totally ignored, direct evidence of highly subjective and gender-related **[9]** criteria applied by Purolator in all aspects of employment.[7] The Supervisory Manual instructs personnel conducting initial interviews of applicants for jobs that it is "especially important to detect" the applicant's marital status and ages of any children. (J.A. 723). The Manual goes on to explain:

> In the case of women applicants, the number and ages of children are important. Follow-up in the interview should ascertain how the children are to be taken care of while the mother works and whether it will be necessary for her to leave her job in the event that they are sick.

(E.A. 1). The Supervisory Manual explains that "the sex of the individual is more often related to job success than one might expect" and further that the "sex of the employee is related to turnover." (E.A. 1). These policies remained in effect at least until 1983 or 1984. (J.A. 2102).

Two high level company officials, James Rapp ("Rapp") and Paul Wolfrum ("Wolfrum"), confirmed that promotions are based on supervisors' selections, for which no objective qualifications are established; nor is there job posting within Purolator. Both Rapp and Wolfrum testified that they never had to request a promotion to a higher position; rather, each

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6 The results of this study were statistically significant at two standard deviations or greater. *See Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977). "As a general rule for such large samples, if the difference between the expected value and the observed value is greater than two or three standard deviations," then the hypothesis that exempt employees at Purolator were hired without regard to sex would be suspect. *Id. See also Hazelwood School District v. United States*, 433 U.S. 299, 309 n.14 (1977).

7 The Court ignored this direct evidence both in the denial of class certification and in its ultimate decision on liability. The evidence was uncontroverted and clearly highly relevant; the Court simply made no reference to it.

was tapped for each promotion by another male superior. (*See* J.A. 668; 2862). In conformity with that practice, Purolator's manuals instruct supervisors that, "before deciding on a man for promotion," they should weigh subjective criteria, such as the candidates' "heat resistance" or ability "to handle himself when [the] heat is on", **[10]** whether he is a "self-starter", or is "loyal" because "being loyal to the Company . . . is a quality required of men who are responsible for the success of its operation." (J.A. 668).

The trial evidence also showed, without contradiction, that Sheehan's supervisor refused to "take [ ] seriously" her request for transfer to a field position because she had children. (J.A. 2203).[8] A former male manager testified that he was told to pay women low salaries because they had husbands, that women were paid less than their male counterparts and that based upon his management experience within Purolator, it was more difficult to get salary increases and promotions for women than for men. (E.A. 362-63, 365-66, 394, 399).

Finally, Purolator's former affirmative action officer believed that affirmative action at Purolator was given only lip service. (E.A. 125; J.A. 2174-77). This was borne out by the admission in Purolator's affirmative action plan that women were underutilized at the official managerial levels. (E.A. 3-4). Another witness testified without contradiction that Purolator's affirmative action deficiencies disqualified it for certain government contracts. (J.A. 2277-79).

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8 Another female employee would have testified that Delany (Sheehan's and Henoch's supervisor) told her that she would not be considered for a position because no one would be respectful of a woman in it. (J.A. 2524-25). The Court did not permit the employee to testify on the ground that her testimony went to the classwide issues. In so doing, the Court erroneously rejected the argument that the testimony was relevant to show Delany's sex-biased attitude in personnel decisionmaking. (*See infra*, pp. 38-39).

Salary Disparities

[11] Plaintiffs established that women were not only relegated to a limited number of jobs, but that they were paid far less than men who occupied male only jobs. Thus, plaintiffs' evidence showed:

	Average Weekly Salary of Female-Only Job Titles	Average Weekly Salary of Male-Only Job Titles	Difference Weekly	Difference Annually
1976	$248	$364	-$116	-$ 6,032
1977	293	437	- 144	- 7,488
1978	261	444	- 183	- 9,516
1979	277	476	- 199	- 10,348
1980	311	513	- 202	- 10,504
1981	311	621	- 310	- 16,120
1982	362	711	- 349	- 18,148

(E.A. 108; J.A. 733).

In 1982, the mean salary for all exempt employees was $435.41 per week. The mean salary of the 798 male exempts was $490.21 per week; the mean salary of the 315 female exempts was $296.58. That difference between male and female salaries translated into an annual disparity of $10,068.76 in favor of men. (E.A. 107; J.A. 733-34).

Gross salary differences between Purolator's male and female exempt employees were shown to exist even within job groupings. For example, in 1982, male managers earned $622 per week—female managers earned $387 (an annual difference of $12,220); similarly, in 1982, male supervisors earned $450 per week—female supervisors earned $322 (an annual difference of $6,656). The male salary advantage persisted even where males and females with comparable tenure were compared. (J.A. 734-35).

[12] Plaintiffs' regression analysis, which remained unrebutted by defendants (*see*, *infra*, p. 41) showed that when sex, age of employee, tenure with Purolator, and job groupings were factored and considered simultaneously, male salary domi-

nance persisted at a statistically significant level of two standard deviations or greater:

	Weekly Male-Female Salary Difference	Annual Male-Female Salary Difference
1980	-$60	-$3,120
1981	- 81	- 4,212
1982	- 99	- 5,148

(J.A. 735; E.A. 106).[9]

Promotion and Training

Plaintiffs' evidence established, through proof of longstanding sex-segregation of Purolator's work force and gross male salary advantage, that defendants' promote from within policy was not applied evenhandedly and that Purolator's written preference for promoting men over women (*see* J.A. 726) was in fact applied to personnel decisions.

Promotion discrimination also was demonstrated by the fact that men who achieve high-level, male-only positions are promoted out of job categories occupied by both sexes. For example, in 1982, men who were in the *male-only* job categories of Division Transportation Manager, Regional Operations Manager, **[13]** District Operations Manager, Divisional Vice President, District Manager, and Account Executive had at one time occupied *sex-integrated* "feeder" positions of courier, courier supervisor, dispatcher, and sales representative. (J.A. 735).

Plaintiffs established, without contradiction, that during the years 1981 and 1982, ten men and no women were appointed to defendant's Management Training program, and that since 1975, thirty-nine men and five women held the position of Management Trainee. (E.A. 113). In 1982, a woman who had gone

9 When geographic location was factored in, the male-female salary difference increased; to wit, in 1980—$3,432; 1981—$4,524; and 1982—$5,356. (J.A. 1258). These disparities were statistically significant at two standard deviations or greater.

through the Training Program was earning approximately $108.00 less per week than the male who had completed that same Program. (E.A. 113).

Women also have been denied the right to certain important fringe benefits, including corporate automobiles, a not inconsiderable supplementary form of compensation. (*See*, *infra*, p. 41).

Personnel Policies

Purolator is highly centralized and all decisions affecting its employees at all locations emanate from Corporate Headquarters. All business decisions come from Headquarters; all personnel decisions, including job descriptions, lines of progression, hire, discipline, termination and salary are dictated by Headquarters. Uniformity is achieved through periodic meetings with management personnel and issuance by Headquarters of standarized policies and procedures. (*See* J.A. 707-22).
[14] Additionally, for many personnel matters, managers from headquarters go into the field to assure uniformity of response to particular problems. (*See* J.A. 712-22). Purolator's efforts to portray itself as decentralized were put to rest during trial, when its former Senior Vice President for Human Resources explained his resignation in 1982 as arising from his philosophical differences with Senior Management: He espoused decentralization; *they insisted on strict centralization*. (J.A. 2156).

Claims of the Proposed Class Representatives

The plaintiffs are women who were employed by Purolator in exempt positions.[10] Plaintiffs' claims were typical of those of the proposed class. Sheehan and Henoch asserted that, as other class members had been, they had been discriminated against in the terms and conditions of their employment because they were women; that they had been denied opportunities open to similarly qualified or less qualified men; and were paid low salaries and denied other benefits because they were women.

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10 At the time of the class certification motion, Sheehan's employment had been terminated; Hellriegel had quit, claiming that harassment had made her continued employment impossible; Henoch remained employed.

Just before she was fired, Sheehan was classified as a Staff Vice President, Administration. She alleged that her employment was unlawfully terminated on August 5, 1981 in retaliation for her complaints against defendant. (J.A. 34). Prior to joining Purolator in 1969, she had been employed as a **[15]** manager with another company for nine years. (J.A. 697-98, 1785).

From early in her employment, Sheehan sought opportunities to move from a staff position at Corporate Headquarters into a line position in the field, where there were better opportunities for advancement and increased salary. (J.A. 698, 1819-22). She repeatedly expressed to top management her observation that women in the Corporation were being denied a chance to move into higher level positions and were being grossly undercompensated in comparison to similar males. (J.A. 698, 1819, 1838, 1840). She pointed out that a simple head count would confirm the longstanding practice of excluding women from upper-level jobs. (J.A. 698). John Nichols ("Nichols"), one of the supervisors, recorded for the file Sheehan's discussions with him reflecting her efforts to obtain a fair salary and promotion opportunity. One of his memoranda quotes her as saying in 1980 that she would wait to see what the new President's "policy toward women and men in similar positions was." (E.A. 8).

Sheenan's requests for equity for herself and other women in the Corporation first were rebuffed by either the excuse that there were no available positions, although she saw her male subordinates getting the jobs she had sought, or the promise to "get back to her". (J.A. 698). Nichols, Sheehan's supervisor at the time, testified at trial that he did not take seriously Sheehan's request for transfer because she had children (J.A. 2203).

[16] Henoch received a B.S. in Marketing from New York University in 1947. (J.A. 700, 2233). At the time Henoch was hired as a secretary by defendant in 1967, she had acquired business experience. (J.A. 700, 2233-34). Shortly after her hire, Henoch became responsible for handling applications to the Interstate Commerce Commission ("ICC") for Purolator's tariff approvals. (J.A. 700, 2239-43).

On her own time and at her own expense, Henoch pursued a course to become licensed as an ICC practitioner. (J.A. 700).

Despite the responsibilities she had assumed in the handling of tariffs, and despite the title changes which resulted in her ultimately acquiring the title of Staff Vice President, Henoch's salary did not keep pace with that of men who were promoted faster or paid more than she, although their responsibilities and qualifications were comparable to hers. (J.A. 700). Like Sheehan, Henoch was denied use of a company automobile while her male counterparts enjoyed this perquisite. (J.A. 700-01).

Henoch's requests for consideration for transfers and for promotions were ignored by Purolator. During the seventies, she applied for a position in the Marketing Department, because she had a marketing degree and was seeking opportunities to advance. (J.A. 2247-48). Her application, in her words, was "not taken seriously." (J.A. 2248). Henoch spoke on a number of occasions to Delany, Nichols and to Executive Vice President, James Perry ("Perry"), about the slowness of her progress in the Company. (J.A. 2311-12). In those conversations, Henoch **[17]** emphasized that she was seeking a line position with decision-making functions. (J.A. 2312). She was never offered such an opportunity.

Like Sheehan, Henoch was denied salary and bonuses equivalent to those granted similarly qualified males. As early as 1975, Henoch began to complain about her salary, after she saw less qualified and lower ranking males being hired at higher wages than she was making. (J.A. 2308).

Retaliation

Within months of filing her EEOC charge Sheehan was fired. Almost immediately after she filed the charge, her responsibilities were changed drastically. (*See* J.A. 1908-11, 1894-95). Her long-time subordinates were called into a meeting to witness her demotion. She was the target of insults; her ability and integrity were impugned. Her hours were montiored, she was yelled at by her supervisors and a memo-writing campaign was designed to keep her on the defensive. (*See* J.A. 1902, 1904-07).

Sheehan finally reached the end of her rope when she was required to endure a meeting to review her job responsibilities

and was asked whether her main job function was typing the purchase orders. (J.A. 1911-12). Rather than blow up and cause a scene, as other Purolator employees were wont to do, Sheehan simply left the meeting. When summoned back to the meeting, she returned as directed, only to be accused of having constructed a false job description. She again left and refused to go back because she "was so upset and could not take anymore." [18] (J.A. 1912-20). She was immediately fired for what the District Court called "gross insubordination." (J.A. 3225).

Sheehan was forced to leave Purolator's premises immediately and was denied severance pay. As a result, Sheehan was not permitted to vest in her pension (which she would have done just one month later), and her son was forced to withdraw from college in order to support his mother. (J.A. 1923).

The District Court's own findings show the infirmity of its ruling that Sheehan was not retaliated against. The Court found that "Delany's temper was manifested indiscriminately, against men and women both subordinate and superior to him." (J.A. 3233). Yet, Purolator tolerated that behavior from him, and, unlike Sheehan, allowed him to resign.

Although not as dramatic, Henoch suffered from a similar pattern of retaliation—a day-to-day harassment in the form of memos, surveillance, insults and maligning her to outsiders. (*See, e.g.*, J.A. 2271, 2304, 2339, 2340-42). Again, that Purolator tolerated the outrageous, unprofessional behavior from Delany, while not putting an end to the abuse suffered by Henoch, mandated a finding of unlawful retaliation.

[19]

ARGUMENT

POINT I

DENIAL OF CLASS CERTIFICATION WAS AN ABUSE OF DISCRETION

The District Court's decision refusing to certify the class was an abuse of discretion, and in direct contravention of the prevailing law in this Circuit. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 594 (2d Cir. 1986); *Society for Good Will to*

Retarded Children v Cuomo, 737 F.2d 1239, 1243 (2d Cir. 1984). The Court's failure to rule on plaintiffs' motion in light of the evidence adduced at trial is also error. *See Rossini*, 798 F.2d at 594-96.

A. The District Court Erroneously Required Affidavits from Class Members When Plaintiffs Presented Substantial Evidence of Defendants' Discriminatory Policies and Statistical Evidence of Discrimination

The District Court incorrectly held that, in its view of *Falcon*, the following substantial evidence was insufficient to show an aggrieved class:

> 1) a lengthy affidavit describing the experiences of the three named plaintiffs, including their deposition testimony; 2) affidavits from two former employees, one, a woman formerly employed, describing pervasive sex discrimination, and one from a male officer, no longer employed by the company, describing Purolator's personnel policies and practices; 3) hundreds of pages of exhibits from defendants' own records which constituted direct evidence of Purolator's discriminatory personnel policies; and 4) unrebutted statistics showing sex segregation of jobs and an unrefuted regression analysis showing statistically signficant male-female salary disparities.

[20] Despite the evidence of discrimination presented by plaintiffs, the District Court nonetheless refused to certify a class primarily because of its view that, since *Falcon*, plaintiffs are required to provide affidavits from class members showing that they too felt aggrieved. 103 F.R.D. at 648-49.

The Court's clear belief, couched in terms of either the "existence of an aggrieved class," or commonality or typicality, is that there must be a show of hands by the class on whether they support the class action and whether they want the named plaintiffs to be their representatives. 103 F.R.D. at 648; *see also* J.A. at 1670-71. Such an "opt-in" procedure is antithetical to the class action device and has been rejected. *See, e.g., Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1556-

57 (11th Cir.), *cert. denied*, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986); *Rule v. Iron Workers, Local 296*, 568 F.2d 558 (8th Cir. 1977); *Bauman v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1977).

Rule 23 does not require that class members opt-in. At most, class actions certified under 23(b)(3) require class members to be permitted to opt-out.[11] The *Manual for Complex Litigation* recommends that courts not make submission of a proof of claim by class members a condition to membership in the class because this would be the equivalent of an "opt-in" procedure and inappropriate under Rule 23. MCL 2d (1985) § 30.232. It also provides that courts should avoid class definitions that "depend on . . . the seeking of relief (for example, persons claiming **[21]** injury or seeking damages from some stated practice)," because such a definition would constitute "an improper opt-in procedure." *Id.* ¶ 30.14.

In *Rule v. Iron Workers, Local 296*, the district court certified a class action under 23(b)(3) and directed that notice be sent to the class stating that any member who did not request exclusion or who did not return the notice would be in the class. The district court then decertified the class on the ground that the number of persons affirmatively requesting inclusion in the class was so small in relation to the entire class that it failed to meet the numerosity requirement. *See Rule*, 568 F.2d at 561. The Court of Appeals for the Eighth Circuit reversed, explaining that "to use as a yardstick the number of class members who affirmatively opted in (17) although not ever requested to do so, was to employ a totally unreliable, if not irrelevant, statistic." *Id.* at 564. The court noted that a required response would be inconsistent with the opt-out provisions of Rule 23. *Id.* at 563 n.4. *See also Bauman v. United States District Court*, 557 F.2d 650, 659 (9th Cir. 1977) ("If the district court intends, however, to use non-responses [to notices to class members] to determine that the nunerosity requirement has not been satisfied, it is abusing its discretion because the probable practical effect of the notice would be to preclude all class actions in

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11 Plaintiffs' motion was brought pursuant to Rule 23(b)(2), not 23(b)(3).

major employment discrimination cases.") Similarly, in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d at 1556-57, the Court of Appeals for the Eleventh Circuit reversed the use of discovery sanctions to dismiss class members **[22]** on the grounds that it had the same effect as an affirmative opt-in procedure and was contrary to Rule 23.

Here, the District Court ignored the purpose of class actions, which are designed to vindicate the rights of persons in the class who need not come forward and be named, nor expend funds to litigate their claims. A requirement of affidavit submissions by class members would be tantamount to an opt-in requirement, which is unquestionably inappropriate in any Rule 23(b)(2) class action, and especially so in employment cases where many of the class members are currently employed by the defendant.

The Court below, in applying its view of the need for such affidavits, referred to fifty-six sex discrimination complaints that had been filed by Purolator female employees but discounted that evidence. 103 F.R.D. at 649. The Court assumed that most of the complaints were automatically irrelevant on the theory that they had come from non-exempt (hourly paid) female employees. *Id.* The Court failed to recognize that these complaints were relevant to the discriminatory atmosphere in which women were forced to function at Purolator and about which they were complaining. Such evidence of biased attitude in the work place is not irrelevant, as the Court apparently believed.

The decisions cited by the Court below do not support its erroneous view that, since *Falcon*, affidavits from class members who "feel aggrieved" are essential. In *Grant v. Morgan Guaranty Trust Company*, 548 F.Supp. 1189, 1193 (S.D.N.Y. 1982), plaintiffs' counsel conceded during argument on the class **[23]** certification motion that the class claims rested primarily on the allegation that defendant had discriminated against plaintiff individually. *Warren v. ITT World Communications, Inc.*, 95 F.R.D. 425 (S.D.N.Y. 1982) was similar. There, the individual plaintiff's EEOC charge was limited to plaintiff's individual complaint that her job description discriminatorily omitted some of the tasks for which she was responsible, thereby depressing her compensation. In refusing

to certify a class, the court concluded that her class claim rested entirely on her allegation that she had been discriminated against individually.[12] 95 F.R.D. at 428-30.

The Arkansas opinion, *Benson v. Little Rock Hilton Inn*, 30 Empl. Prac. Dec. (CCH) ¶ 33, 188 (E.D. Ark. 1982) is so wholly inapposite as to make puzzling the Court's citation to it. That court initiated its own inquiry concerning the facts underlying the class allegations:

> The Court's inquiries have been directed to a number of specific areas in which the plaintiffs' case for class certification appeared questionable. Despite the ample opportunity the Court has afforded the plaintiff to factually support the allegations with respect to the certification requirements enumerated above, the plaintiff has failed to adequately document her claims with affidavits, depositions, interrogatories, or otherwise, and has failed even to properly proffer the supportive facts which would be adduced at an evidentiary hearing, if one were held.

[24] *Id.* at p. 27,701.[13]

The District Court also referred to pre-*Falcon* decisions in which some courts had refused to certify Title VII class actions where the plaintiffs had failed to produce affidavits or other evidence to establish the existence of an aggrieved class. However, the cases do not support the Court's broad statement, and to the extent they support an absolute requirement of affidavits from class members, plaintiffs submit they are wrong and contrary to controlling law of this Circuit.

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12 Nor do the two cases from the Northern District of Georgia support the proposition that affidavits of class members are needed for class certification. *See* 103 F.R.D. at 648. Those two cases, decided by the same District Court Judge, invited renewed submissions by plaintiffs on class certification motions as a result of the Court's view of the impact of *Falcon* on pending motions. Nowhere in either opinion is it said that such affidavits are required by *Falcon*.

13 Here, during the argument on the class certification motion, the Court inquired concerning procedures to satisfy it of compliance with Rule 23. Plaintiffs' counsel informed the Court that the Court could hold a hearing to receive additional evidence. (J.A. 1671).

Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975), simply has no relevance to the case at bar. Nowhere in the decision did the court state that affidavits from the class members were necessary.[14]

Richardson v. Restaurant Marketing Associates, Inc., 83 F.R.D 268, 270 (N.D. Cal. 1978) is also inapposite. In that case, the court denied certification on the ground that plaintiffs sought to certify six restaurant facilities owned by **[25]** defendant while the allegations concerned only one restaurant that was no longer managed by the defendant and its previous manager, who was no longer employed by the company.

Compounding its error in requiring affidavits, the District Court's class certification decision failed to consider plaintiffs' substantial evidence of defendants' discriminatory policies, as well as plaintiffs' unrebutted statistical showing of sex-based salary differences between men and women.

The District Court found fault with the statistics offered by plaintiffs in support of the class certification motion, and stated that the statistics did not, by themselves, establish the existence of an aggrieved class of female employees. Since *Teamsters v. United States*, 431 U.S. 324, 339 (1977), it has been axiomatic that employment discrimination may be established by statistical proof. *See also Rossini*, 798 F.2d at 604. *Teamsters* has been uniformly endorsed by subsequent decisions of the Supreme Court. *Falcon* did not overrule it or diminish its vitality. To require preliminary proof for class certification of a different

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14 In the instant case, the named plaintiffs in their depositions referred to other women who, in their opinion had suffered discriminatory treatment. The Court was provided this information. (J.A. 697-704).

The Court also was referred to Sheena's deposition testimony that she had urged defendants to review their own records to confirm her statements that women were underpaid. (J.A. 698-699) When, during trial, a female employee was called as a witness by plaintiffs to testify as to her own experience which showed a general attitude of discrimination against women by defendants, and specifically by a male who had supervised both Sheehan and Henoch, the Court refused to hear her testimony. (*See, infra*, pp. 38-39).

kind than is required to prove liability to the class is simply unwarranted.[15]

[26] Finally, in rejecting plaintiffs' statistics, the District Court reiterated its view that plaintiffs needed to submit additional affidavits from class members because "statistics alone [do not] indicate that other female employees feel aggrieved," citing *Steffin v. First Charter Financial Corporation*, 77 F.R.D. 498 (C.D. Cal. 1978). 103 F.R.D. at 649. As discussed *infra*, such requirement, standing alone, is error.[16]

B. The District Court's Refusal To Certify The Plaintiffs As Class Representatives Was An Abuse Of Discretion

The District Court's reasons for finding that plaintiffs did not meet the commonality or typicality requirements of Rule 23(a) can be summarized as follows: (1) the plaintiffs were too "high level;" (2) the plaintiffs were unique; and (3) the plaintiffs filed retaliation charges. These reasons are wrong as a matter of law and fact. The Court misconstrued the class claims, placed undue emphasis on plaintiffs' titles and elevated plaintiffs to an unduly high status. The Court also imported a new requirement into Rule 23—plaintiffs cannot be different in any respect from other members of the class.

Although the District Court purportedly rejected defendants' attempt to have it rule that disparate treatment Title VII class actions were barred by *Falcon*, the District Court's decision, if

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15 The Court, on the class certification motion, had substantial statistical evidence of both sex segregation and gross male/female salary disparities presented by plaintiffs based on a study of *all* exempt employees. (*See* J.A. 727-35). Defendants responded with a study based on an artificial *sample*, 1/2 male and 1/2 female (where females constituted less than 30% of all exempts), "randomly" selected employees, which in total were fewer than 8% of all exempt employees in 1982. (*See* J.A. 1255-60), Defendants' expert admitted "that the sample size was not large enough to permit [him] to draw a firm conclusion about all exempt employees." (J.A. 1072). The Court, nonetheless, rejected plaintiffs' statistics on the ground that all relevant variables had not been considered, a view that is directly at variance with *Bazemore*, 92 L. Ed. 2d at 331.

16 To the extent that *Steffin* turns on the absence of class member affidavits, its holding is erroneous, and certainly not good law in this Circuit or elsewhere.

left undisturbed, would have nearly the same effect. In *Rossini*, this Court rejected a narrow reading of *Falcon* and reversed the District Court's decertification of **[27]** promotion and training claims very similar to those alleged here. 798 F.2d at 596-600. As in *Rossini*, the plaintiffs here claimed they had to " 'perform' at a higher level than men in order to advance their careers." *Id.* at 599.

In *Falcon*, the Supreme Court did not create a new requirement that a class representative have individual claims identical to all of the class claims. *See Rossini*, 798 F.2d at 596-600; *Lilly v. Harris Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984) ("the [Supreme] Court also rejected those cases. . . . requiring that the class representatives necessarily have suffered discrimination in precisely the same employment practice as did all the other members of the class"). Class claims need only be "fairly encompassed" in the named plaintiff's claims. *Falcon*, 457 U.S. at 156. While the Supreme Court rejected the use of unsupported inferences as satisfying the requirements of Rule 23, *id.* at 158, it directed the focus to defendants' practices, and whether the different practices operated "in the same general fashion such as through entirely subjective decisionmaking processes." *Id.* at 159 n.15.

Focus on the practice at issue in the instant case reveals that, as plaintiffs both alleged and demonstrated, those practices operated in the "same general fashion" and Purolator's policy of sex discrimination affected the class in the same way that it did the individual plaintiffs. *Id.* at 159 n. 15. This showing is sufficient for commonality and typicality under Rule 23. *See Rossini*, 798 F.2d at 598-99; *Cox v. American Cast Iron* **[28]** Pipe Co., 784 F.2d at 1557-58 (holding it was an abuse of discretion to decertify class raising compensation, promotion, and training claims); *McKenzie v. Sawyer*, 684 F.2d 62, 74 (D.C. Cir. 1982) ("similar employment practices, applied to related employment decisions"); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) ("similarity of legal theory may control even in the face of differences of fact"). Plaintiffs, therefore, need not, for example, hold the same job title as other class members. *See Rossini*, 798 F.2d at 599; *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 616-17

(5th Cir. 1983) (custodial employees can represent class including clerical workers in case alleging channeling of female workers).

Rather than following *Falcon* as it purported to do, the District Court erroneously ventured into the merits of the class claims and required virtual identicality rather than typicality of the claims. *See Eisen v. Carlisle*, 417 U.S. 156, 177 (1974). *See also Avagliqano v. Sumitomo Shoki America, Inc.*, 104 F.R.D. 562, 573 (S.D.N.Y. 1984) (rejecting a similar attempt by a defendant to inject a merits of inquiry into the class certification proceeding in order to narrow the class).

1. *High Level.* The District Court's refusal to certify plaintiffs as class representatives based on their "high level" is especially troubling. Plaintiffs sought to represent a class of exempt employees, not Purolator's entire female work-force. The Court rejected the plaintiffs as class representatives because over the years they had received **[29]** "promotions" and salary increases. However, the class promotion claim was that females were promoted *more slowly than* similarly situated males, and that defendants refused to promote women into line jobs, not that they were never promoted. (*See* J.A. 33). The named plaintiffs claimed, in common with the class, that if they had been male, they would have advanced more rapidly and would have reached higher levels; they would have been considered for line rather than staff positions; and they would have been paid higher salaries. (*See* J.A. 32-33).

Plaintiffs claimed that men who started at low levels as the plaintiffs had were promoted far more often and received much higher salaries. (J.A. 33). Just because plaintiffs managed to have been promoted does not mean that their experience was unrelated to that of other women who were at different points in their careers but who, like the plaintiffs, encountered the same sex-based barriers. The fact that a plaintiff is subject to the same discriminatory practices "and yet *overcame them* does not disqualify her from serving as a class agent provided there is 'significant proof that an employer operated under a policy of discrimination.' " *Hansen v. Webster*, 41 FEP Cases 214, 223-24 (D.D.C. 1986) (quoting *Falcon*, 457 U.S. at 159, n.15) (emphasis in original). As discussed *supra*, plaintiffs provided

such proof in the form of evidence of discriminatory personnel policies, other direct evidence of discrimination, as well as statistical evidence.

In any event, plaintiffs were not nearly as high level as the District Court suggested. In rejecting defendants' **[30]** argument that Henoch's officer title disqualified her from being a class representative, the District Court claimed to reject an argument that emphasized form over substance. *See* 103 F.R.D at 651 n.10. Nonetheless, the Court, in effect, let the plaintiffs' titles determine its decision. The District Court simply ignored other compelling evidence, such as plaintiffs' salaries and job functions. Sheehan was earning $28,000 per year when her employment was terminated in 1981, hardly the salary of a high level executive. (E.A. 115). Henoch's salary at the time the class complaint was filed was $34,240. (E.A. 119). At trial, defendants' strategy was to attempt to protray Henoch essentially as a clerical. (*See generally* J.A. 2398-2410).

Purolator's former Senior Vice President of Human Resources candidly testifed at trial that titles were often given instead of salary increases. (J.A. 2191). Although plaintiffs were among the higher-ranking women at Purolator, the District Court in finding plaintiffs to be inadequate representatives ignored the many higher-level men and the virtual, if not total, absence of women at higher levels. Sheehan and Henoch both had titles of Staff Vice President, the "entry level into the officer hierarchy" (J.A. 2192); there were many levels of officers above them, virtually all of which were occupied by males. (J.A. 2191-92; E.A. 105).

The effect of the District Court's rule is that any employee at one end or another of a group could not be an appropriate class representative, a proposition which finds no support in the law. *Rowe v. Bailar*, 26 FEP Cases 1145 (D.D.C. **[31]** 1981), upon which the District Court so heavily relied, *see* 103 F.R.D. at 651, is inconsistent with the law in this Circuit, and its facts also bear no resemblance to those presented here. In *Rowe*, the plaintiff, unlike Sheehan and Henoch, does not appear to have alleged salary discrimination. In addition, the court there suggested that statistics cannot be used as the primary proof of discrimination in a disparate treatment case, 26 FEP Cases at

1146, a position emphatically rejected by the Supreme Court in *Bazemore*, and by this Court in *Rossini*. The court also found the class allegations to be "conclusory allegations of discrimination" and noted that the defendant had facially neutral personnel policies, *id.* at 1147; neither factor is found in this case.[17] Finally, the *Rowe* court noted that the plaintiff had received generally favorable treatment throughout his employment; that question goes to the merits of the plaintiffs' discrimination claims and should not be resolved at the class certification stage.

Ultimately, the District Court's finding that the plaintiffs were inappropriate representatives because of their high level rests on the Court's erroneous, unsupported, statement that:

> The interests of secretaries and customer-service representatives may not be co-extensive with the interests of a Staff **[32]** Vice President or Director. Nor can it be assumed that the same practices and criteria are applied to employment decisions including low level and high level employees.

103 F.R.D. at 652. The District Court's reference to secretaries and customer service representatives is inexplicable. In early 1982, Purolator reclassified the salaried position of Customer Service Representative as "salaried, non-exempt", although from the creation of the classification in or about 1978 through early 1982, the position was classified as exempt. (J.A. 706 n.10). At the time the job was reclassified, a few secretarial positions were also changed from exempt to non-exempt status. (*Id.*) The Court's decision cites to Defendants' Supplemental Memorandum of Law, at 13, where defendants claimed *without citation* that "[w]omen exempt employees at Courier run the gamut from secretaries and customer service representatives to

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17 In this case, the District Court found that plaintiffs failed to specify acts of discrimination with respect to the class claims and equated that alleged failure to the general conclusory class claims in *Rowe*. 103 F.R.D. at 651 n.11. As discussed *supra*, plaintiffs provided the Court with more than should be required on a motion for class certification. Moreover, plaintiffs presented additional evidence at trial showing defendants' discriminatory policies. The Court simply ignored that evidence and plaintiffs' motion for reconsideration of the class certification motion.

corporate officers and professionals." This memorandum was submitted in February 1983 a *year* after Courier had changed the status of these women to non-exempt.[18]

Finally, noticeably absent from the District Court's opinion is any reference to the many decisions in which courts have certified classes of exempt or professional employees similar to that sought here. *See, e.g., Rossini*, 798 F.2d 590; *Meyer v. MacMillan Publishing Co., Inc.*, 95 F.R.D. 411 (S.D.N.Y. 1982). If the Court had legitimate concerns about some women, such as secretaries, being included in the class, it should have **[33]** certified the class expressly omitting them from the defined class. *See, e.g., Lo Re v. Chase Manhattan Corp.*, 431 F.Supp. 189, 198 (S.D.N.Y. 1977) (certifying a class of all females who "are now employed, have been employed, or have sought employment with the corporate defendants in official, managerial or professional positions" and excluding clericals, tellers and secretaries from the class.)

2. *Uniqueness.* The District Court also found Henoch to be an inappropriate representative "because of the particularly unique circumstances of her employment." 103 F.R.D. at 652. Because Henoch might have to prove additional facts to support her claim, does not mean she is not a proper class representative. "Commonality was not destroyed merely because [the plaintiff's] individual claim also required proof of some facts that differed from those of the class claim." *Rossini*, 798 F.2d at 599. The effect of the Court's ruling, if left to stand, would mean that a company like Purolator, which has a myriad of job titles and functions in its exempt work force, many of which could be called "unique" would be immune from class actions.

It simply is not required that a representative perform the same type of work as class members. *See Rossini*, 798 F.2d at 599 ("The distinction that [the class representative] was performing on creativity tests while class members were perform-

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18 In moving for class certification of a class of *exempt* employees plaintiffs should not be faulted for defendants' erroneous inclusion of certain employees in the exempt category, arguably in violation of the federal wage and hour laws.

ing on day-to-day work assignments is of little importance in light of the allegation that it was the same standardless, subjective evaluation system that operated in both cases'"). The cases cited by the District Court to support its disqualification **[34]** of Henoch present extreme examples where the class claims clearly were added as an afterthought to individual litigation over termination of employment. The cases do *not* involve employees who occupy a "special position."[19]

3. *Retaliation.* Finally, the Court found the plaintiffs to be inadequate representatives because they made retaliation claims. The Court held that Sheehan's retaliatory discharge claim made her an inadequate representative of the class, and, similarly, that Hellriegel's harassment and retaliation claims and Henoch's retaliation claims made them inadequate representatives, 103 F.R.D. at 652, 656.[20] The disqualification of plaintiffs by virtue of their retaliation claims has no basis in fact and is contrary to the policies underlying the laws prohibiting retaliation. For a court to hold that a plaintiff becomes an inadequate class representative by **[35]** virtue of claiming retaliation invites retaliation as a means of defeating a class suit. *See*

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19 In *Williams v. Boorstin*, 451 F.Supp. 1117, 1124 (D.D.C. 1978), *rev'd on other grounds*, 663 F.2d 109 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981), the plaintiff, although apparently alleging class claims of discrimination in recruitment, hiring, promotion, and termination, claimed only his discharge in common with the class. The termination of his employment occurred in the very unusual circumstances of his having masqueraded as a law student and lawyer during his employment although he had attended only one year of law school. *See id.* at 1119-21. The other two cases cited by the District Court similarly involve discrimination actions arising out of employment termination, without a showing, as here, of discriminatory policies. *See Martin v. Easton Pub. Co.*, 73 F.R.D. 678 (E.D. Pa. 1977); *Odom v. U.S. Homes Corp.*, 76 F.R.D. 381 (S.D. Tex. 1975).

20 In rejecting Hellriegel as a class representative, the Court cited the lower court decision in *Rossini*, 80 F.R.D. 131, 135-36, reversed by this Court, to hold that because Hellriegel supervised some members of the class, she could not be a representative for those members. 103 F.R.D. at 655 n.12. That position was rejected in this Court's decision in *Rossini*, 798 F.2d at 596.

Holsey v. Armour & Co., 743 F.2d 199, 217 n.8 (4th Cir. 1984).[21]

The test of adequacy of representation is whether the proposed representative has interests antagonistic to those of the class members. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968). Any antagonism between the representative and the class must be real rather than academic, *Herbst v. Able*, 46 F.R.D. 11 (S.D.N.Y. 1969), and must relate to the subject matter in controversy. *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 874 (8th Cir. 1977); *Mersey v. First Republic Corporation*, 43 F.R.D. 465, 468 (S.D.N.Y. 1968). Here, there was no showing of a conflict with the proposed class members over the subject matter of the litigation. Defendants made no such showing, nor did they submit any affidavits from class members in opposition to certification of the plaintiffs as class representatives.

Accordingly, the Court abused its discretion in refusing to certify a class of exempt employees.

[36] **POINT II**

THE DISTRICT COURT'S FINDINGS ON SHEEHAN'S AND HENOCH'S DISCRIMINATION CLAIMS ARE CLEARLY ERRONEOUS

A. The District Court's Failure To Consider The Discriminatory Atmosphere And The Sex-Biased Attitude Of Purolator's Decisionmakers Constitutes Reversible Error

A district court's findings are clearly erroneous "to the extent they fail to recognize [important] incidents and reject or fail to draw inferences which [are] found [to be] inescapable from the record." *Griffin v. City of Omaha*, 785 F.2d 620, 628 (8th Cir. 1985) (quoting *Alexander v. National Farmers Organization*,

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21 During oral argument, the Court asked plaintiffs' counsel whether the plaintiffs would forgo their "personalized" retaliation claims. (J.A. 1672-73). Although believing this to be a totally improper request, counsel stated that if necessary plaintiffs would. (*Id.*) Nonetheless, the Court persisted in holding that the retaliation claims made the plaintiffs unique and, therefore, atypical.

687 F.2d 1173, 1203 (8th Cir. 1982), *cert. denied*, 461 U.S. 637 (1983)) (bracketed [important] in original). It is also error for a court to ignore, without comment, highly probative evidence of discrimination. "When direct evidence of discrimination has been introduced, the lower court must, as an initial matter, specifically state whether or not it believes plaintiff's proffered direct evidence." *Thompkins v. Morris Brown College*, 752 F.2d 558, 564 (11th Cir. 1985). If the court rejects such evidence, it should state "why this apparently highly probative evidence was discredited . . . [since] [i]n these circumstances some indication of the Court's reasons for rejecting this evidence must be given in order for us to exercise properly our function of appellate review." *Id.* (quoting *Lee v. Russell County Board of Education*, 684 F.2d 769, 775 (11th Cir. 1982) (bracketed [since] [in] in original.) *See also Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1557 (11th Cir. 1983). The District Court committed such error here, where it totally **[37]** ignored plaintiffs' direct evidence of discrimination, offered both at the class certification stage and during trial, and provided no explanation in either opinion for the failure to give weight even to uncontraverted, direct evidence.

Plaintiffs offered written policies in which Purolator specifically referred to sex as an important element to be considered in personnel decisionmaking (E.A. 1), expressed a preference for promoting males (J.A. 726), and advised supervisors to consider the number of children that female employees have in order to determine level of responsibility to give them. (E.A. 1). Significantly, these policies were signed by James Rapp and Robert Ulrich, former President of Purolator, who made decisions with respect to plaintiffs Sheehan and Henoch, and whose signatures on those policies indicated their attitudes with respect to gender as a consideration in Purolator's decisionmaking. The testimony at trial was that these policies were distributed company-wide to all managerial personnel and not superceded until December 1983 or January 1984—three years after this litigation was commenced. (J.A. 2101-02). *None* of this evidence was even commented upon by the District Court.

In addition to those written policies the Court also ignored testimony from a former manager of Purolator that he had

been told by Rapp, among others, to hire women at lower salaries than comparably situated men because women have "husbands." (E.A. 399). The witness also observed that, based on his managerial experience within Purolator, it was more difficult to get women promoted than men and that if you were female "you weren't going to move ahead with Purolator." (E.A. 381).

At trial, the Court precluded a witness, Providence Balzano ("Balzano"), from testifying that Delany (one of the defendants' major policy makers) told her she could not have a job because men would not respect a woman in that particular position. (J.A. 2525). The Court's rationale for precluding this testimony was that this was not a class action case.[22] The Court abused its discretion in precluding this testimony, where it was highly relevant to show Delany's bias.

The Court's utter failure to acknowledge such highly relevant evidence of discrimination is puzzling, and its decision should be reversed on that ground alone. *See Hopkins v. Price Waterhouse*, ____ F.2d ____, 44 FEP Cases 825, 833 (D.C. Cir. 1987) (violation of Title VII established by plaintiff's showing that "Price Waterhouse was impermissibly infected by stereotypical attitudes towards female candidates"); *Wheeler v. City of Columbus*, 686 F.2d 1144, 1154 (5th Cir. 1982) (decision vacated for lower court's failure to consider and analyze discrimination claim in the light of sexist comments and pattern of discriminatory hiring practices, which "would constitute proof probative of the existence of intentional discrimination"); *McKenna v. Weinberger*, 729 F.2d 789, 790 (D.C. Cir. 1984) ("Where a woman is frustrated in her attempts to work **[39]** cooperatively by the sexist attitudes and actions of her male coworkers, she is a victim of discrimination.") *See also Equal Employment Opportunity Commission v. Sage Realty Corp.*, 87 F.R.D. 365, 368 (S.D.N.Y. 1980) ("[N]o matter what form the sex-biased or sex-stereotyped decision may take, when it operates as an impediment to employment opportunity for

22 It is ironic that the Court prevented Balzano from testifying in view of the Court's concern in its class certification decision that plaintiffs had not supplied affidavits from women complaining about Purolator's discriminatory practices.

women, Title VII requires its elimination."); *Jordan v. Wilson*, 649 F.Supp. 1038, 1058 n.13 (M.D. Ala. 1986) (general statements about women probative evidence of discrimination because they "help[ ] illuminate the department's general attitude towards female officers.")

B. The District Court Improperly Evaluated The Statistical Evidence

At trial and in support of class certification, plaintiffs offered an array of statistical evidence in support of their claims, including a regression analysis which showed that on average Purolator's exempt male employees were earning between three and five thousand dollars per year more than Purolator's exempt female employees, and that difference in pay was statistically significant at 2 standard deviations or greater.[23] (*See* J.A. 727-36; E.A. 106).

Plaintiffs also demonstrated that, based upon a comparison between the 1982 census-derived, nationally qualified female work force and the Purolator work force, there was an **[40]** underrepresentation of females in Purolator's exempt job categories, and the underrepresentation was statistically significant at two standard deviations or greater. (J.A. 732; E.A. 110).

Furthermore, unlike what appears generally to be true in the United States, the salary differential between Purolator's male and female exempt employees, based on seniority, is increasing:

1982 PERCENT MALE SALARY, ADVANTAGE BY YEAR OF EXEMPT EMPLOYEE'S HIRE AT PUROLATOR

Pre-1966	1966-75	1976-77	1978-79	1980-81	1982
(N/A—only one female current employee hired pre-1966)	48.8%	49.1%	62.3%	49.5%	66.1%

23 Plaintiffs' regression analysis included variables for sex, age, years of service with Purolator, and job title. (E.A. 106). A study including these same variables and geographic location showed similar results. (J.A. 1255-60).

(E.A. 111). Thus, for example, in 1982, men who had from seven to sixteen years of service with Purolator were earning about 49% more than women with the same seniority; and men who had from three to four years of service with Purolator were earning 62% more than women with equal seniority. This in a company which has an express policy of promoting from within, and in which a high school education "with experience" are sufficient qualifications for most jobs. (J.A. 2860).

As to training, plaintiffs showed that during 1981-82, ten men and no women were allowed to participate in Purolator's Management Training Program and during the period [41] 1975-1980 of thirty-four participants in that same Program, only five were women. As of 1982, a female employed by Purolator who had gone through the Management Training Program was earning about $108.00 less per week than the remaining male who had been appointed to that same program. (E.A. 113).

Finally, with respect to fringe benefits, plaintiffs showed that the proportionate difference between the number of women employed in job categories eligible to receive the automobile fringe benefit and men employed in job categories eligible to receive that same benefit was statistically significant at two standard deviations or greater. (E.A. 114).

Defendants did not challenge the validity of any of plaintiffs' studies. Their expert conceded the accuracy of plaintiffs' regression analysis and testified that the methodology employed for that study was sound. (J.A. 3026-27). Nor did he comment on or challenge plaintiffs' work force analysis or plaintiffs' automobile fringe benefit study.

Rather, defendants' expert criticized plaintiffs' regression analysis on the ground that it excluded variables (primarily education and prior experience) that *might* make a difference in the results. He testified that, although he had performed an analysis of only one hundred of Purolator's employees, he could draw no conclusion about what effect, if any, the omission of these variables would have on plaintiffs' regression analysis, which included *all* exempt employees:

> Court: You indicated several minutes ago that two very significant variables are education and total job experience?
>
> **[42]** Witness: Yes.
>
> * * *
>
> The Court: What effect would the exclusion of those variables have, upon the validity of this? [Plaintiffs' regression analysis (Ex. 227) (E.A. 106)].
>
> * * *
>
> The Witness: That's a terrific question. I don't know. The answer is, it could have a big effect. And unless you have the data you don't know.

(J.A. 3037). With respect to his own regression, defendants' expert stated "the sample size of his study was not large enough to permit me to draw a firm conclusion about all exempt employees." (J.A. 3142). Accordingly, defendants' expert concluded:

> [I]t [defendants' study] doesn't prove there is no significant difference for the whole group of exempts. . . . [T]hat could only be shown by doing the calculations and doing the collecting the data for all the exempts.

(J.A. 3143). Plaintiffs' studies, however, included "the whole group of exempts" and remained unrebutted.

In *Bazemore*, the Supreme Court reaffirmed its approval of the use of regression analysis to *prove* a plaintiffs' case of discrimination, and in so doing, stated:

> Importantly, it is clear that a regression analysis that includes less than all measurable variables may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.

[43] 92 L.Ed.2d at 331 (citations omitted). The Supreme Court in *Bazemore* also disapproved the rejection based on speculation of uncontradicted statistical evidence. Thus, in finding that

the lower court had improperly rejected plaintiffs' regression studies by crediting the questionable evidence offered by the defendant, the Court explained:

> There was very little evidence to show that there was in fact no disparity in salaries between blacks and whites, or to demonstrate that any disparities that existed were the product of chance. . . . *Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of—statistical or otherwise—to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites.*

Bazemore, 92 L.Ed.2d at 333 n.14.

This Court, too, found the rejection of a plaintiff's regression study to be an abuse of discretion when that rejection was based "on the speculative basis that the table's results might 'possibly' have been different if [the] military experience [variable] had been included." *Rossini*, 798 F.2d at 604, citing *Bazemore*, for the proposition that regression analysis excluding some variables may still be valid evidence of employment discrimination.[24] *See also Eastland v. TVA*, 704 F.2d 613, 623 (11th Cir. 1983) (variables in statistical models should be those **[44]** likely to have actual effect in decision-making process under study), *cert. denied*, 465 U.S. 1066 (1984)).[25]

It was error for the District Court to reject plaintiffs' uncontradicted statistical proof on the ground that the regression analysis excluded certain variables, when defendants' own expert testified that he did know what effect the exclusion of the variable had on the results. As in *Bazemore*, the defendants here offered *no* evidence to show that there was "in fact no dis-

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24 This Court found an abuse of discretion, notwithstanding the presence of other statistical studies in which inclusion of a military experience variable had reduced the male-female salary differential. 798 F.2d at 603-04.

25 The inclusion of a variable for education in a study of Purolator's workforce would have been highly questionable given defendants' admission that high school was deemed a sufficient educational background for most jobs. (J.A. 2860).

parity in salaries between [males] and [females], or to demonstrate that any disparities that existed were the products of chance." *Bazemore*, 92 L.Ed.2d at 333 n.14. It offered only a limited study, from which its expert conceded, no conclusions could be drawn. And with respect to plaintiffs' work-force and automobile benefit analyses, defendants offered no evidence to undermine them and simply never questioned them. The Court's rejection of these studies without comment is reversible error.

POINT III

THE DISTRICT COURT'S FAILURE TO EXAMINE FULLY PLAINTIFFS' RETALIATION CLAIMS REQUIRES REVERSAL

To establish a prima facie claim of retaliation under Title VII, a plaintiff may show: (a) known statutorily protected opposition; (b) adverse employment action against the plaintiff; and (c) a causal connection between the two, *i.e.*, a retaliatory **[45]** motive playing *a part* in the adverse employment action. *Davis v. State University of New York*, 802 F.2d 638, 642 (2d Cir. 1986). *See also DeCintio v. Westchester County Medical Center*, ____ F.2d ____, 44 FEP Cases 33, 36-37 & n.8 (2d Cir. 1987); *Dominic v. Consolidated Edison Co.*, ____ F.2d ____, 44 FEP Cases 268, 272 (2d Cir. 1987). Once the plaintiff has established those three elements, a prima facie case of retaliation has been made, and the employer is obliged to articulate a legitimate, non-retaliatory reason for the adverse action in order to attempt to refute any inference of retaliation which may be drawn from the plaintiff's prima facie showing. *See Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980).

If such a justification is offered, plaintiff then is entitled to offer evidence calculated to show that the employer's articulated justification for the employment action was pretextual, *i.e.*, "a cover up for retaliation." *See Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979

(1981); *see, generally*, *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04 (1973).

Evidence that an employee who has complained of discrimination is disciplined for an infraction, while the employer does not take similar action against others for "similar derelictions," provides the causal connection between protected activity and retaliation. *DeCintio*, 44 FEP at 36. *See also* at *id.* at 37 n.8.

The District Court simply made no effort either to analyze defendants' purported reasons for the treatment of **[46]** Sheehan and Henoch after they filed charges, compared with how they were treated before that event, or to assess the credibility of the evidence with regard to the reasons offered by defendants for their actions against those women. In addition, the Court below ignored direct evidence of defendants' retaliatory motive and failed to weigh defendants' asserted reasons in light of that evidence. The Court's finding must be reversed, for it does not represent the result of a choice between two permissible views of the evidence, *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985), but rather is supported by no plausible evidence whatsoever.

The District Court simply ignored substantial evidence that the filing of charges had a very profound effect on Sheehan's and Henoch's supervisors, which was reflected in their subsequent treatment of Sheehan and Henoch. The Court below made no mention of the direct evidence of retaliatory intent, including Delany's emotional reaction to their filing of charges (J.A. 2551-55),[26] or uncontradicted testimony from a non-party witness that defendants undertook to solicit unfavorable comments about Sheehan's job performance and "set her up." (E.A. 370-76).

Both plaintiffs were subject to surveillance by their supervisors (*see* E.A. 61, 62-67) and subjected to memo-writing campaigns. None of this evidence is even hinted at in the Court's opinion. Yet this type of behavior has been found to constitute retaliation. *Moffett v. Gene B. Glick Co.*, 621 F. **[47]** Supp.

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26 One of defendants' own witnesses testified about how Delany blew up when told of the charges and had to be calmed down with "booze." (J.A. 2554-55).

244, 282 (N.D. Ind. 1985) ("[t]he attempt to build up documentation to justify a dismissal after an employee has filed a charge against the employer can be evidence of retaliation"). *See Francis v. American Telephone & Telegraph Co.*, 55 F.R.D. 202, 207 (D.D.C. 1972).

The District Court examined Sheehan's retaliation claim in a vacuum, ignoring evidence that Sheehan's one-time infraction under great duress, was *de minimis* as compared to the routine behavior of Courier's male officers, who went unpunished or were dealt with far less severely. In contrast, the Court below, while discussing few facts at all, referred to events that defendants did not even offer as bases for Sheehan's discharge as if the Court were searching for non-discriminatory explanations. The Court stated that Sheehan on occasion left work early, ignoring evidence that other officers also left early and came in late. (J.A. 2527). The Court stated that Sheehan "left work" for more than one month, ignoring the fact that she was out of work because of a medically certified severe back problem. (J.A. 1876). And there is absolutely no support in the record for the Court's statement that Sheehan was frequently absent after she returned to work.

The District Court found that Sheehan began to act differently after she filed EEOC charges. (J.A. 3230).[27] Again, the Court ignored substantial evidence that it was Purolator's **[48]** top management who began to act differently toward Sheehan. A review of the long series of petty memos directed at Sheehan, usually by Delany, (*see, e.g.*, E.A. 14, 16, 17, 20, 22, 23, 24, 29, 45, 171, 181, 184) shows that something more than the normal course of business was going on. Many of the memoranda were criticisms of Sheehan for the mail and supply room and with respect to the telephones, areas over which Sheehan no longer had responsibility. (*See* E.A. 14, 20, 22, 23, 181; J.A. 1890, 1900). Sheehan continued to receive these memos, even after she requested that the campaign stop. (E.A. 34).

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27 One of the examples the Court cites is that Sheehan sought an extension of a loan she had from Courier. This was incorrect; she protested having her loan called in before it was due. (J.A. 3230). No explanation is offered of how this is an example of "different behavior."

Finally, the District Court erroneously analyzed the termination of Sheehan's employment without reference to evidence of Purolator's treatment of male, non-complaining employees. Sheehan, who worked for Purolator for ten years was fired for one act of insubordination, that is, leaving a meeting. Yet Delany, who kicked a hole in Henoch's desk (J.A. 2328, 2544-45), and who the Court found had a temper which "manifested [itself] indiscriminately, against men and women both subordinate *and superior* to him," (J.A. 3233) was never fired for any of his behavior, which included "blow[ing] up on more than one occasion with senior officers, officers of rank equal to him and subordinates." (J.A. 2958). Anthony Graziano, Purolator's Senior Vice President of Legal and Corporate Affairs similarly testified that Delany was well known for losing his temper and was not fired when he did so with executives. (J.A. 3002-03). Only after many years of his behavior did Purolator ask for his **[49]** *resignation*—he was not fired as was Sheehan.[28] Disciplining employees in a protected class more harshly than employees outside the class is a violation of Title VII, and evidence of retaliation. *See DeCintio*, 44 FEP Cases at 36 n.8. *See also Mosley v. General Motors Corp.*, 497 F. Supp. 583, 589 (E.D. Mo. 1980), *aff'd* 691 F.2d 504 (8th Cir. 1982). The District Court's failure to recognize the disparity in treatment between Delany and Sheehan and between Delany and Henoch, revealed by the Court's own findings, constitutes reversible error.

[50] **CONCLUSION**

For the foregoing reasons, and based upon the record, plaintiffs-appellants respectfully request that this Court reverse the decisions below in their entirety, and order certification of the class and entry of judgment in favor of plaintiffs Sheehan and Henoch on their individual claims, or, alternatively reverse the decisions below and remand the case to the District Court for further proceedings consistent with this Court's opinion.

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28 If Sheehan has been permitted to resign, she would have qualified for severance benefits (*see* J.A. 2110) and her pension would have vested.

Dated: New York, New York
September 4, 1987

Respectfully submitted,

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87-7540

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs-Appellants,

—against—

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 87-7540

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Defendants-Appellees.

PRELIMINARY STATEMENT

Defendants' Brief is filled with smoke and mirrors. In an attempt to justify the glaring failure of the District Court even to acknowledge the existence of highly probative evidence, defendants misrepresent the facts, attribute findings to the District Court that the Court did not make, and misstate the holdings and reasoning of controlling precedent. For example:

1. Defendants say that "the *undisputed* record showed that appellants' claims were atypical of those of the alleged class." (Def. Br. at 1-2) (emphasis added). Not only did plaintiffs establish otherwise, but also for defendants to call the record "undisputed" shows how hyperbole is substituted for fact.

2. Defendants attempt to distinguish *Rossini* on the ground that Purolator's decisionmaking was decentralized. (Def. Br. at 26-27). The **[2]** District Court made no such finding, and the record overwhelmingly establishes highly centralized decisionmaking. (*See*, *infra*, pp. 5-8).

3. Defendants say that the Supreme Court's decision in *Bazemore* addresses the admissibility of regression analyses,

not the proper evidentiary weight to be accorded them. (Def. Br. at 16-17). They are wrong. All of the regression analyses addressed by the Supreme Court in *Bazemore* had been admitted into evidence. The Supreme Court reversed the lower court because it had improperly discounted the plaintiffs' analyses for having excluded certain variables.

4. Defendants say that the District Court ignored the Company's gender-biased policies because those policies were "old" and because they allegedly were not applied at corporate headquarters. (Def. Br. at 19, 43). The District Court made no such finding. Those policies were not old; they were issued in 1971, renewed in 1975 and remained in effect until 1983 or 1984. (J.A. 2101-02, 2106; E.A. 1). It also is disingenuous at best for defendants to ask this Court to overlook such highly relevant evidence when the policies emanated from corporate headquarters, were signed by a former President of Courier, and were contained in the Transportation Manual—the Manual considered to be every field supervisor's "bible" and the prime reference for corporate policy. (J.A. 1212 n.9).

5. Defendants characterize plaintiffs' salaries of $28,000 (Sheehan) and $38,000 (Henoch) as "substantial," without comparing them with those earned by males. (Def. Br. at 3-4, 6).

6. Without citation, and without disputing plaintiffs' statement to the contrary, defendants continue to assert that secretaries and customer service representatives would be part of the class (Def. Br. at 9, [3] 24), notwithstanding defendants' knowledge that those two groups had been misclassified as exempt employees on the computer tapes defendants had given plaintiffs in discovery. (J.A. 706 n.10).

7. Defendants, in attempting to justify the District Court's failure to give proper weight to plaintiffs' regression analysis, say that the study excluded "concededly" relevant variables. (Def. Br. at 16). Nowhere have plaintiffs conceded the relevance of the variables; in fact, plaintiffs assert that education level (one of the variables) is totally irrelevant given that many corporate officers started as couriers (J.A. 667-68), and many

officers, including Purolator's President, had only a high school diploma. (J.A. 2860). A high school diploma plus experience was sufficient for most jobs in the company. (*Id.*)

8. Defendants repeatedly say that plaintiffs did not have "anecdotal" testimony, apparently contending that "anecdotal" evidence can come only from affidavits or testimony of class members. That argument is nothing more than an attempt to avoid the facts that: plaintiffs submitted written policies of discrimination; a witness who had been a manager for many years testified that he was told to pay women less because they had husbands and that in his experience as a manager he found it more difficult to get women promoted than men (E.A. 362-63, 365-66, 394, 399); a witness was precluded from testifying that she was told by Delany that she could not be promoted into a certain position because she was a woman (J.A. 2524-25); another female employee submitted an affidavit on the Rule 23 motion that described discrimination against women as the defendants' standard operating procedure throughout the Company (J.A. 1234-38)—the affidavit was discounted by defendants because this woman was "in the field" (Def. Br. at 9 **[4]** n.5); Purolator's former affirmative action manager testified that affirmative action at Purolator was a negative subject and given lip service at best. (E.A. 125; J.A. 2174-77). *All* of this evidence was ignored by the District Court in both decisions, and defendants deal with it no better here.

9. Defendants in their Brief never address the District Court's failure to decide plaintiffs' renewed motion for class certification made at the end of trial. This silence is sharply at odds with defendants' suggestion that this Court should consider facts concerning the individual claims developed at trial in reviewing the class certification decision. (Def. Br. at 16, 25).

ARGUMENT

POINT I

DEFENDANTS FAIL TO JUSTIFY THE COURT'S REFUSAL TO CERTIFY A CLASS

A Defendants Misread *Falcon*

Defendants say that *Falcon*, 457 U.S. 147 (1982) requires plaintiffs to show for class certification that there existed "a significant number of female employees at Courier who share appellants' claims." (Def. Br. at 1; *see also*, Def. Br. at 9, quoting the District Court). Defendants never give a citation to a page in *Falcon* for that proposition. In view of the fact that numerosity was never in issue, with a putative class of 315 women, that argument simply should have no place in this case. Moreover, in so arguing, defendants resolutely ignore, as did the District Court, plaintiffs' proof of defendants' corporate-wide policy of discrimination. The District Court's memorandum opinion fails even to mention plaintiffs' unrebutted showing of defendants' blatantly discriminatory employment **[5]** practices. The Supreme Court in *Falcon* made clear, however, that with the showing of such biased practices "a class action on behalf of every employee who might have been prejudiced . . . would satisfy the commonality and typicality requirements of Rule 23(a)." *See* 457 U.S. 147, 159 n. 15.

Nor does *Falcon* make any mention of affidavits from class members as either a necessary or a preferred form of evidence supporting class certification. At the urging of defendants, the District Court erroneously focused on the lack of affidavits from class members here. This approach to Rule 23(a)'s commonality and typicality requirements finds no support in the applicable case law.[1]

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1 During oral argument on the class certification motion, the Court asked: "Is it your view that affidavits from other persons who feel aggrieved by a discriminatory or disparate practice are required as a precedent to my making a class certification determination?" Counsel for defendants responded: "Your Honor, I believe that is the case . . . I refer your Honor

B. Centralization of Personnel Decisionmaking

In attempting to distract attention from the District Court's failure to assess properly plaintiffs' statistical evidence, and to make any findings whatsoever with respect to the plaintiffs' direct evidence of defendants' sex-biased, corporate-wide written policies, defendants focus on an issue as to which the District Court made no reference, allusion or finding: the centralization of defendants' personnel decisionmaking. Defendants state, as if the District Court had so found, that Purolator is decentralized. (Def. Br. at 2, 26-27). Defendants' *ipse dixit* is flatly contradicted by the record. Substantial submissions on the Rule 23 motion **[6]** were addressed to the issue of defendants' centralized decisionmaking, and plaintiffs showed, overwhelmingly, that defendants' corporate headquarters completely controlled the development and implementation of all personnel policies. (J.A. 1203-22; 1247-54; 1265-1300).

Nonetheless, defendants attempt to distinguish this case from *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590 (2d Cir. 1986) on the totally specious basis that defendants' personnel decisions allegedly were made on a decentralized basis. Defendants claim that in *Rossini* all employment decisions were made "by a small group of people at headquarters" (Def. Br. at 2), and then argue that the "record in this case demonstrates that Courier did not make centralized decisions in that way." *Id.*

Apart from the fact that the District Court's denial of class certification neither turned on centralization of decisionmaking, nor, indeed, even referred to it, defendants' absolute, rigid centralization of all personnel decisionmaking could not have been matched or exceeded in any business establishment.[2]

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to the discussion of the Hicks case— . . ." (J.A. at 1663). As explained at length in plaintiffs' initial Brief to this Court, however, defendants in fact can cite no meaningful authority standing for such a proposition (*See* Plaintiffs-Appellants' Br. at 19-26). The District Court's novel and misguided prerequisite to class certification should be reversed.

2 While defendants argued "decentralization" before the District Court, they were arguing more strenuously before the N.L.R.B. that they were highly centralized. (J.A. 1272-84).

Some of the undisputed facts that were before the District Court on this issue are summarized here:[3]

1. All personnel policies issued from corporate headquarters in New Hyde Park and all personnel records were maintained there regardless of [7] where the employee worked. All paychecks issued from corporate headquarters. (J.A 654, 830).

2. Qualifications for various jobs were standardized and, according to Senior Vice President Rapp, persons with the same title should be reasonably interchangeable throughout the country. (J.A. 654).

3. Uniform job descriptions applicable nationally were developed by the Director of Compensation, a member of the corporate staff. (J.A. 661).

4. Purolator had standardized numbers of holidays, dress-codes, employee benefits, etc. It had a standard layoff policy, the implementation of which was monitored from New Hyde Park. (J.A. 661).

5. Corporate guidelines governed discipline of employees. When an employee in any location was to be discharged or suspended, the local manager was required to check with the divisional vice president, who in turn called corporate headquarters to ensure that the discipline was consistent with uniform corporate-wide policy. (J.A. 656).

6. Corporate Headquarters investigated and responded to all EEO charges filed by any employee. Since 1976 Douglas, a Group Vice President at Headquarters, determined whether an EEO charge should be litigated or settled. (J.A. 656).

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3 All statements in this summary are taken from affidavits submitted in support of plaintiffs' Rule 23 Motion. They were, without exception, based on Defendants' Answers to Interrogatories or deposition testimony of defendants' officers. (J.A. 649-64). Plaintiffs' motion papers also described the total centralization of all business decisionmaking in corporate headquarters, including marketing, legal, financial and purchasing. (J.A. 650-54). Additionally, defendants admitted that Courier's personnel practices "are fixed by Mr. Borgna [defendants' then Senior Vice President for Human Resources], in consultation with Courier's President" (J.A. 797).

7. Douglas developed job application forms that were distributed nationally and that he "sanitized to insure compliance" with the law. Douglas' office prepared the EEO-1 report for all field locations and the Corporation's consolidated EEO-1 report. (J.A. 657).

8. Salary administration policies, salary structures and ranges, and all salary expense budgets for all categories of employees were approved and authorized by the President and Chief Executive Officer of the Corporate Office of Personnel. Salary increases were determined at New Hyde Park for all employees. (J.A. 659).

9. The Corporate Personnel Department reviewed all salary actions recommended by supervisory personnel in the field to ensure compliance with established policy and consistency between Departments; reviewed and approved all merit increases recommended by the field for non-managerial employees; approved salary adjustments resulting from a reclassification, promotion, or merit review; reclassified positions upon a substantial change in the job's content. (J.A. 659-60).

10. Corporate perquisites, such as use of a company automobile, were the subject of detailed policy. (J.A. 660).

11. Personnel selection clinics, at which attendance of area managers was mandatory, were held around the country to teach interviewing skills. Recruitment was centralized to the extent that classified advertisements for job openings in any part of the Corporation, and anywhere in the country, were placed by someone on Eugene Borgna's staff. (J.A. 661).

[8] 12. Corporate headquarters coordinated all recommendations for promotions of management and sales personnel. No commitment could have been made to any employee in the Corporation without Headquarters' review of the intended promotion. (J.A. 662).[4]

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4 In 1982, then President Wilfred Lebert issued a memorandum to Courier executives which stated that: "*[N]o promotion or transfer* of personnel will occur unless authorized by me with cost and position evaluations fully documented." (J.A. 1209) (emphasis in original).

13. Supervisory skills were taught through standardized training programs conducted by the Training Department at Corporate Headquarters. Its purpose was to expose trainees to work in the various areas of the Corporation in both the field and Headquarters, so that at the end of two years they would have been able to choose the area in which they wished to work. (J.A. 663).

14. All requests for intracompany transfers were handled by the Corporate Office of Personnel in the case of non-exempt employees, and by the Corporate Office of Executive Planning in the case of exempt employees. (J.A. 664).

Defendants' statement in its Brief that "the push" for centralization began in 1984 (Def. Br. at 30. n.19) is belied so resoundingly by every one of defendants' witnesses that the statement cannot have been inadvertent error. Eugene Borgna and James Rapp testified that since at least 1975 Purolator attempted to achieve national uniformity with respect to wages and salaries (J.A. 654); Douglas testified that even before he was hired in 1974, defendants had begun to standardize personnel policies, such as wages, number of holidays, dress habits, employee benefits, and that he continued those efforts. (J.A. 655). The statements referred to in the summary above described long standing practices, not those planned for some time in the future.

C. Class Representatives

Defendants' assertion that plaintiffs "cannot and do not dispute" what defendants characterize as "the essential element underlying the **[9]** trial court's conclusion"—that "they (the named plaintiffs) were atypical of other women" is patently absurd.[5] (Def. Br. at 23). Plaintiffs, from the inception of this action have been steadfast in their claim that they were

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5 Defendants' argument that this Court should ignore Hellriegel in its review of the District Court's decision is erroneous. At the time the District Court decided the class certification motion Hellriegel had not settled her claims. Had the Court correctly decided the motion, the "expiration" of Hellriegel's claims would not have affected the class action. *See United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980).

typical—typical of all women in the proposed class—in that they shared a workplace where men were given preferred treatment and job opportunities because they were male. They urged the District Court to see that the *jobs* of all women in the class did not have to be the same; that only their legal claims had to be the same. The plaintiffs never said they were clones of the other class members; they said they were women, and, as all women in the class, suffered different and less favorable treatment than men. (J.A. 1646-8; 1670).

Defendants combine argument on the merits with argument on class certification in their discussion of typicality. Their argument that plaintiffs were too successful is an extension of their argument that plaintiffs were not discriminated against, since if they were successful, they could neither claim discrimination nor be typical. Both on the class certification motion and at trial plaintiffs claimed that had they been male they *would* have been successful, that they would have been paid as well as comparable males and given opportunities to move up the ranks.[6]

[10] Rather than address plaintiffs' arguments that plaintiffs were not atypical of the class of women salaried employees, defendants claim that the District Court's ruling is consistent with "well-established" case law precluding high ranking employees from being class representatives. (Def. Br. at 24). Defendants fail to cite to such well-established case law and completely ignore the case law to the contrary cited in plaintiffs' Brief. In any event, defendants never answer plaintiffs' claim that had plaintiffs been male they would have been more successful, they would have been paid as well as comparable men and they would have been given different and better opportunities to move up. These are the typical and common elements plaintiffs share with the class.

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6 Defendants' reference to Sheehan's "success," for example, is heavy with irony. They say she was responsible for purchasing office supplies—approximately 15% of Courier's purchases "company-wide." Defendants also report her salary after ten years with the company as $28,000, a fraction of that earned by similarly "successful" males. (*See* Def. Br. at 4; J.E. 115-18; J.A. 1760).

Defendants also rely on clear misstatements about the composition of the putative class to attack plaintiffs' "typicality." Without disputing plaintiffs' assertion that secretaries and customer service representatives were excluded from the class for which plaintiffs sought certification, that is, a class of exempt employees, defendants, again without citation, rely on their presence "in the class."[7]

Defendants further erroneously claim that plaintiffs suggest the District Court should have certified a "narrower class of higher ranking female employees." (Def. Br. at 24). To the contrary, plaintiffs argued that, if the District Court had considered the presence of secretaries and service representatives in the class to have been inappropriate (despite the fact that few if any would have remained in the class after defendants corrected their records), it could have excluded them from the class.

[11] As to the claim that plaintiffs were "unique," defendants' arguments would preclude class certification in any workforce such as Purolator's and limit class actions only to workforces composed of employees with the same job. This is not the law:

> The fact that the jobs performed by the named plaintiffs are, in some sense unique, is not a bar to their being class representatives. If it were, no class of professional employees could ever be certified.

Meyer v. Macmillan Publishing Co., Inc., 95 F.R.D. 411, 414 (S.D.N.Y. 1982) (citing *Lo Re v. Chase Manhattan Corp.*, 431 F.Supp. 189 (S.D.N.Y 1977)). *See also Rossini*, 597 F.Supp. 1120, 1131-32 (S.D.N.Y. 1984), *rev'd on other grounds*, 798 F.2d 590 (2d Cir. 1986); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 617 (5th Cir. 1983); *Paxton v. Union National Bank*, 688 F.2d 552, 562 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

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7 Defendants do not and cannot dispute that women in those categories had prior to 1982 been erroneously classified as exempt employees by Purolator. Plaintiffs' complaint described the putative class as including only exempt (salaried) employees, using defendants' terminology and classification.

Defendants again repeat the erroneous argument made to the District Court that plaintiffs disqualified themselves from serving as class representatives because they asserted retaliation claims in addition to salary, promotion and transfer claims. (Def. Br. at 10). As usual, defendants fail to address plaintiffs' arguments, no doubt because there is no legitimate response to the fact that a rule such as that proposed here would require plaintiffs to abandon retaliation claims in order to pursue class claims. Nothing in the law requires class representatives to make such a choice. In any event, Sheehan's "principal" claim is not retaliation. (Def. Br. at 28). She claims and claimed discrimination in salary, promotion, transfer *and* retaliation. (J.A. 34-5; J.A. 14-16).

Finally, the cases cited by defendants are not on point. (Def. Br. at 25). In *Alexander v. Gino's Inc.*, 621 F.2d 71 (3d Cir). *cert. denied*, **[12]** 449 U.S. 953 (1980), for example, the court did not consider whether a plaintiff working at one level or location within a company could represent a class that included employees at different levels. The *Alexander* court rejected a class action challenge to Gino's discharge and promotion policies because members of the proposed discharge class each left the company under very different circumstances and because the plaintiff could not specify any member of the proposed promotion class. In *Martin v. Easton Publishing Co.*, 73 F.R.D. 678 (E.D. Pa. 1977) and *Harris v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (N.D. Cal. 1977) the plaintiffs' employment was terminated and they then brought class actions alleging discrimination in virtually all terms and conditions of employment. Indeed, in *Pan American* the plaintiff refused another position with the defendant, 74 F.R.D. at 56. Here, Sheehan was fired only *after* complaining about discrimination in terms and conditions of employment and Henoch remained employed. Thus, the nexus with the class in this case was established and continued throughout the litigation.

D. Effect of Dismissal of Plaintiffs' Individual Claims

Defendants' claim that class certification is now precluded because plaintiffs failed to prevail on the merits at the trial of their individual claims is plainly wrong. (*See* Def. Br. at 31). They ask this Court to review this case in a wholly inappropriate and backwards way. The Court first should look to the class certification decision; if it is reversed, the Court should then remand the individual cases to be considered in the light of a decision on the class claims. *Rossini*, 798 F.2d at 606. That is so because, as this Court ruled in *Rossini*, if class certification were granted and plaintiffs prevailed in proving class-wide discrimination, **[13]** they would then be entitled to a presumption of discriminatory intent. *See Id.*

The Fifth Circuit decision *Trevino v. Holly Sugar Corp.*, 811 F.2d 896 (5th Cir. 1987), cited by defendants, is not consistent with the law of this Circuit.[8] The rule in this Circuit is to look at the class certification first. If it is in error, the named plaintiffs' individual claims should be remanded. *Rossini*, 798 F.2d at 606. The *Trevino* court did just the opposite, first affirming the judgment against the plaintiffs on their individual claims, then affirming denial of class certification because these plaintiffs without individual claims could not serve as class representatives. This backward logic totally ignores the interests of the class. Significantly, however, in contrast to the trial here, the District Court in *Trevino* did analyze evidence of class-wide discrimination in considering the individual claims. The *Trevino* defendants "presented legitimate, non-discriminatory reasons to account for the disparities that plaintiffs attributed to discrimination." 811 F.2d at 905. In this case, the District Court refused to consider any class-type evidence during the trial of the individual claims, and defendants' counsel repeatedly

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8 The Ninth Circuit decision cited by defendants, *Betts v. Reliable Collection Agency Ltd.*, 659 F.2d 1000 (9th Cir. 1981) (Def. Br. at 31), is not on point. That court held that the district court had no authority under Rule 23 to create one "subclass" two years after judgment, for which there was no representative.

argued that this was not a class trial.[9] Evidence of class-wide discriminatory practices by **[14]** defendants remains unrebutted and has been ignored by the trial court. Under these circumstances, both the class claims and the individual claims should be remanded. *Rossini*, 798 F.2d at 606.[10]

POINT II

DEFENDANTS HAVE FAILED TO JUSTIFY THE DISTRICT COURT'S ERRONEOUS TREATMENT OF THE EVIDENCE

A. Statistical Evidence

In discussing plaintiffs' arguments on the statistics, defendants again resort to hyperbole, distortion and outright misstatements. For example, defendants say that the Supreme Court's decision in *Bazemore v. Friday*, ____, U.S. ____, 106 S.Ct. 3000, 92 L.Ed.2d. 315 (1986) controls only as to the admissibility of regression analyses, and that the District Court here complied with *Bazemore* because it admitted plaintiffs' studies into evidence and "considered" them. Thus, defendants

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9 In an offer of documents into evidence by plaintiffs, the following colloquy occurred:

> The Court: What is your position with respect to those?
>
> Plaintiffs' Counsel: Our position with respect to all these documents is that it shows a pattern of treatment of women and the attitude of supervisors toward women as either permitted or encouraged by the upper level management which issues these documents.
>
> The Court: It seems to me that goes to proof which may be relevant in a class action. We are not dealing with a class action. We're dealing with claimed discrimination against Ms. Sheehan and Ms. Henoch.

(J.A. 2592-93; see also, J.A. 3089; 2522-24).

10 The failure of the named plaintiffs to prove that they were victims of individual instances of discrimination does not necessarily prevent the court from finding the existence of a "pattern or practice of discrimination as to the class." *Perryman v. Johnson Products Co.*, 698 F.2d 1138, 1146 (11th Cir. 1983) (citations omitted). *See also Goodman v. Lukens Steel Co.*, 777 F.2d 113, 123 n.6 (3d Cir. 1985) ("[t]he fact that some of the named plaintiffs did not prevail on their individual claims does not make them inadequate class representatives").

state: "In *Bazemore*, the district court refused to admit into evidence a regression analysis that, like **[15]** appellants' here, did not include all possible variables that might contribute to salary disparities." (Def. Br. at 16).

Defendants' reading of *Bazemore* is plainly and simply wrong, for *all* the regression analyses addressed by the Supreme Court in *Bazemore* had been admitted into evidence. *See* 92 L.Ed. at 330-33. The Supreme Court reversed the lower court, not because of a refusal to admit studies into evidence but because, like the District Court here, the court did not accord proper evidentiary weight to the studies despite the exclusion of certain variables. *Id*. *Bazemore* requires that courts give proper consideration to regression analyses, not the perfunctory consideration defendants would have. As the Court of Appeals for the District of Columbia stated in reversing a lower court's findings on statistical evidence:

> Thus, *Bazemore* instructs lower courts to be cautious about dismissing plaintiffs' statistical studies as not probative simply because defendant offers some nondiscriminatory explanation for the disparities shown. Implicit in the *Bazemore* holding is the principle that a mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by plaintiffs' statistics. To be sure, as the Supreme Court acknowledged in *Bazemore*, there may be a few instances in which the relevance of a factor to the selection process is so obvious that the defendants, by merely pointing out its omission, can defeat the inference of discrimination created by the plaintiffs' statistics. *See* 106 S.Ct. at 3009 n.10. The logic of *Bazemore*, however, dictates that in most cases a defendant cannot rebut statistical evidence by mere conjectures or assertions, without introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion.

Palmer v. Shultz, 815 F.2d 84, 101 (D.C. Cir. 1987) (footnote omitted). *See Sobel v. Yeshiva*, 797 F.2d 1478, 1479 (2d Cir. 1986) (per curiam) (decision **[16]** reversed and remanded in light of *Bazemore*, "particularly with respect to [pre-act discrimination] and the evidentiary weight to be afforded multiple regression analysis. . ."); *Rossini*, 798 F.2d at 604 (citation omitted) ("We hold, however, that it was an abuse of discretion to reject one of plaintiffs' statistical tables, "Second Table C," on the speculative basis that the tables' results might possibly have been different if military experience had been included. While the court could reasonably find that military experience was a permissible variable, it had no basis for holding, in effect, that such a variable was required in order for a statistical study to be valid.").

The District Court's treatment of plaintiffs' statistical evidence here was equally erroneous. Just as in *Bazemore*, *Palmer* and *Rossini*, there was no evidence in the record to support the District Court's conclusion that including variables for education and prior experience would alter the results of plaintiffs' otherwise admittedly valid studies. (*See* J.A. 3026-27). Defendants' own expert testified that he could not tell whether including the variables would alter the results of plaintiffs' studies. (J.A. 3037). Moreover, contrary to what defendants now say, they could not get their expert even to draw a conclusion of no-discrimination with respect to the study he performed on the minor, Procrustean sample of the population that he himself had selected. All defendants' expert could say is that "[a]lthough the sample size was not large enough to permit me to draw a firm conclusion about all exempt employees, the results of this test regression *suggest* that, when all salient variables are controlled for, there is no significant difference between men's and women's salaries at Courier." (J.A. 1072) (emphasis added). Defendants' expert's mere suggestion that a variable might **[17]** make a difference is no different from the conjecture and hypotheses offered by the defendants' in *Baze-*

more, *Rossini* and *Palmer*, and the District Court's dismissal of plaintiffs' studies out of hand was erroneous here too.[11]

Two other reasons render the District Court's rejection of plaintiffs' analysis erroneous. First, it was clear from the record that education level played little or no part in defendants' decisions. (*See* J.A. 2860). Secondly, plaintiffs were denied data on education or prior experience with which they could perform analyses. Defendants' expert claimed education and prior experience data were not maintained by defendants as part of defendants' computerized personnel records. (J.A. 1069-70). Instead, defendants chose to select some of the data themselves and offer the Court a mini-sample study using that information. (J.A. 1070). Under these circumstances, the District Court should have required more of defendants than a "suggestion" as to the relevance of the missing variables. *See Palmer v. Shultz*, 815 F.2d at 110 ("[P]laintiffs cannot be legitimately faulted for gaps in their statistical analysis when the information necessary to close those gaps was possessed only by defendant [ ].") (citations omitted).[12]

[18] With respect to plaintiffs' other statistical evidence, defendants attribute to the District Court findings it never made. They say, for example, that the District Court found that plaintiffs' comparative study of Purolator's exempt workforce with the census-derived qualified workforce "had little probative

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11 Defendants seek to derive comfort from their expert's statement in a pre-trial *affidavit* that plaintiffs' studies would not be an "appropriate basis for drawing a conclusion there was sex discrimination." (*See* Def. Br. at 14 n.6). It is clear, however, that his conclusion was based solely on the fact that variables were excluded from plaintiffs' studies, and as such, cannot be credited. That conclusion also is at odds with his trial *testimony* that he could not determine what effect including those variables would have on plaintiffs' study. (J.A. 3037).

12 Defendants' reliance on *Sobel v. Yeshiva University*, 656 F.Supp. 587 (S.D.N.Y. 1987), *app. pending*, (Docket No. 87-7373) and *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458 (9th Cir. 1987) is misplaced. Unlike defendants here, in both *Sobel* and *Penk* the defendants presented substantial evidence concerning the relevance of the omitted variables and offered statistical studies incorporating the data. Defendants' *suggestion* in this case that the omitted variables might make a difference is a far cry from such evidence.

value." (Def. Br. at 16 n.8). One can search the record and the District Court's opinion in vain to find *any* challenge to plaintiffs' comparative study. As with much of the probative evidence, the District Court ignored it without comment.[13]

B. Non-Statistical Evidence

Defendants' treatment of the non-statistical evidence, which was *totally* disregarded by the District Court, is a completely indefensible kind of advocacy. Admitting, as they must, to having written policies that instructed supervisors to consider sex in personnel decisionmaking, defendants say (1) the policies were in "old" manuals—notwithstanding that on their face the policies show they were issued in 1971 (seven years after Purolator became subject to Title VII), *renewed* in 1975, and admittedly not superseded until 1983 or 1984 (J.A. 2101-02; E.A. 1); and (2) the manuals which contained these policies did not control at corporate headquarters—notwithstanding that *corporate headquarters* issued the policies and disseminated them **[19]** company-wide to all managerial personnel, who considered the Manual containing them to be the "bible." (J.A. 2101-02; *see* J.A. 1212 fn.9).

Defendants also ignore the fact that these policies were issued by James Rapp, a Senior Vice President and Robert Ulrich, who became President of Courier. Both signed off on the 1975 reissued manuals. In the absence of any evidence showing that either Rapp or Ulrich ever changed their obviously biased attitudes, the inference that their attitudes influenced their decisions was compelled. *See Thompkins v. Morris Brown College*, 752 F.2d 558, 564 (11th Cir. 1985). The failure of the Court to

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13 Defendants' expert did not even attempt to refute this study. Nonetheless, defendants now say for the first time that this analysis is invalid because it does not include variables. (Def. Br. at 16 & n.8). That statement shows either a remarkable ignorance about statistics, or is another attempt to mislead this Court. Such comparative studies are common in discrimination cases (*see, e.g., Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Teamsters v. United States*, 431 U.S. 324 (1977)). Indeed, defendants' challenge here is ironic given that the results of this study are corroborated by defendants' own affirmative action plan, which acknowledged that women were underutilized as officials and managers. (E.A. 3).

give proper weight to this evidence is enough, standing alone, to require reversal. (*See* Plaintiffs-Appellants' Br. at 36-39).

Contrary to what defendants urge, there can be no proper justification for the Court to have disregarded the testimony of Dwain Weibe, who testified in trial deposition testimony that he had been told to keep women's salaries low because they had husbands and that he, as a manager, had a more difficult time getting women promoted than he did their "male counterparts." (E.A. 362-63, 365-66, 394, 399). Buried in defendants' brief is their own conclusion that Weibe's testimony was not credible (Def. Br. at 44) as the basis for the District Court's treatment of this evidence. Without such a finding by the District Court, defendants' say so is of no value.

Indeed, the basis offered by defendants to support their self-arrogated fact-finding authority is itself specious, *i.e.*, he was a "disgruntled employee who had carried a grudge against Courier since the day he was fired." (Def. Br. at 44). Weibe was never fired. (E.A. 361). And there was absolutely no evidence, direct or indirect, that this man would commit perjury in order to satisfy some "grudge." His testimony was that he **[20]** came forward because he agreed with the assertions these women were making. (E.A. 389).[14]

Defendants fob off the evidence from their former affirmative action manager that the "subject of Affirmative Action Programs [at Purolator] has been a negative subject and given lip service at best. This of course is my observation during my years of tenure." (E.A. 125; *see* J.A. 2174-75[15]). They say that the "probative value of his testimony is *de minimis*" because

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14 Defendants' use of discredited evidence such as incomplete expense reports is a transparently flimsy attempt to sweep this highly probative testimony under the rug. (*See* Def. Br. at 44). Defendants took the telephone deposition of Rapp in order to validate his diary. During the deposition, however, he admitted that not all of his trips were reflected therein (*see* E.A. 2144-45), and at trial, defendants said they could not find his expense reports (J.A. 3001). Similarly, with respect to expense reports, Wolfrum admitted they were incomplete and interestingly enough defendants did not offer Weibe's expense reports.

15 Harte testified that he included women in his observations. (J.A. 2177).

(1) he was male; (2) he did not testify about specific instances of discrimination; and (3) he had no input into personnel decision-making. (Def. Br. at 22 n.12). All of defendants' reasons for asking this Court to discount Harte's testimony are nonsense. The reference to Harte's gender is, to say the least, bizarre, and the reference to personnel decisions is simply an attempt to mislead. Harte was Purolator's affirmative action manager, not its personnel manager. His testimony related to Purolator's negative attitude about affirmative action,[16] not about specific instances of discrimination or personnel functions. Nor is his testimony "indirect opinion evidence," as defendants state. It is direct evidence with respect to Purolator's attitude **[21]** about affirmative action, an observation based on Harte's many years of experience in the field and with Purolator. (J.E. 125).[17]

In their zeal to sidestep the Harte evidence, defendants have failed even to acknowledge the point of it, *i.e.*, an employer's failure to follow its own affirmative action policies is recognized as probative evidence of the discriminatory intent required to establish a Title VII claim. *Lowe v. City of Monrovia*, 775 F.2d 998, 1007 n.6 (9th Cir. 1985) ("Any evidence that indicates that a defendant intentionally circumvented an affirmative action plan would, of course, be probative regarding the defendants' motives in making a given employment decision.") *Craik v. Minnesota State University*, 731 F.2d 465, 473 (8th Cir. 1984). *Cf. Coser v. Moore*, 739 F.2d 746, 751-52 (2d Cir 1984) (failure by plaintiffs to mount a significant challenge to the good faith of Stony Brook's affirmative action program is a major evidentiary weakness.)

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16 This testimony becomes highly probative when considered in conjunction with the admission in Purolator's Affirmative Action Plan that women were underutilized as professionals and managers. (E.A. 4).

17 Defendants cite *Martin v. Citibank*, 762 F.2d 212. 217 (2d Cir. 1985) in support of their "indirect opinion evidence" argument. In *Martin*, this Court stated that "hearsay testimony" from another black employee, who like the plaintiff there, was forced to take a polygraph examination had no bearing on the case. That employee simply was not knowledgeable as to the reasons for selection of individuals for the polygraph examination. 762 F.2d at 216-17. Harte, on the other hand, was knowledgeable about affirmative action at Purolator—he was responsible for that area.

Finally, defendants tacitly concede that the District Court erred in precluding Providence Balzano's testimony,[18] but claim that it was harmless error to do so. (Def. Br. at 44). On the contrary, Balzano's testimony was highly relevant to motive and would have corroborated the testimony by the plaintiffs with respect to Delany's discriminatory attitude **[22]** toward women generally, and to them in particular. This error, especially when considered in conjunction with the District Court's many other errors, was undoubtedly prejudicial.

C. Plaintiffs' Individual Salary and Other Claims

The District Court disposed of plaintiffs' individual claims of discrimination in salary and other conditions of employment in summary fashion. It is clear that any evidence that showed a *pattern* of discriminatory treatment of women or sex-biased atmosphere was incorrectly viewed by the Court as relevant only to class actions. (*See*, *supra*, 13 n.9).[19]

In sum, the Court, ignoring all evidence of both class and individual discriminatory treatment and excluding evidence of the discriminatory attitude of plaintiffs' direct supervisors, concluded that Sheehan brought about her own downfall by persistently seeking chances for upward mobility instead of remaining silent (J.A. 3237) and erroneously attributed Henoch's treatment to "changed circumstance in the industry." (J.A. 3237). The law doesn't require women to be supine in the face of discrimination, and glancing references to deregulation do not substitute for proof of non-discriminatory reasons in response to proof of pretext.

Defendants' Brief uses a breezy journalistic style in trying to fill in the gaps in the District Court's analysis of the evidence. Defendants do not succeed in showing how, in light of direct

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18 Balzano would have testified that she was told by Delany, one of the key players in this litigation, that she would not get a certain position because he did not believe the customers would respect a woman in it. (J.A. 2524-25).

19 Had plaintiffs the benefit of the evidence of class-wide salary discrimination, or of the company-wide sex-biased employment policies, the Court could not have rejected either plaintiffs' salary claims or other claims of differential treatment.

evidence of a corporate-wide policy of discrimination, and a proffer of evidence of the particular **[23]** discriminatory attitude of plaintiffs' supervisors, their asserted "non-discriminatory" reasons could survive.

POINT III

THE DISTRICT COURT'S DECISION ON RETALIATION IS WHOLLY INDEFENSIBLE, AND DEFENDANTS' ATTEMPT TO SUPPORT IT FALLS SHORT

Defendants' arguments concerning retaliation against the plaintiffs are reduced to its statement that the Court's findings are "certainly not implausible in light of the record." (Def. Br. at 38). Defendants are wrong.

Defendants gratuitously, and without a shred of support in the record, say that Sheehan's absence from work was a case of the "blue flu." (Def. Br. at 38, citing only to testimony that plaintiff was ill.) Defendants noticeably fail to refer to evidence that Sheehan was away because of a medically-certified, severe back problem, and they similarly make up the claim that "[a]fter she was told about the reorganization, Sheehan refused to come to work." (Def. Br. at 4). Defendants' citations do not bear out their assertion; there is absolutely nothing in the record to support the statement that she was capable of working but refused to do so.

Contrary to defendants' claim, Sheehan did not concede at trial that there could be no justification for a subordinate to walk out of a meeting, and that if he or she did so he should be fired. (*See* Def. Br. at 38). She testified that such behavior would not have warranted action "if they were provoked." (J.A. 1933). The provocation to which Sheehan was subjected was repugnant to any standards of civilized behavior. Defendants argue, however, that employees, and certainly upstart females who complain of **[24]** discrimination, must stand there and "take it." Walking away is, for such a women, insubordination, and she must be fired. In contrast, males, like Delany, can kick holes in the desks of women employees, throw temper tantrums, blow up at their bosses, and be rewarded for that

conduct by rising high in the Company. (J.A. 29, 3002-03, 132-33, 23-28, 2544-45).

Henoch did not, as defendants claim, concede at trial that her treatment was no different after she filed her charge than before. (Def. Br. at 43). While she was subjected to harassment and discrimination before she filed her charge, things got worse *after* the charge was filed. She was subjected to surveillance of her hours and Delany told an outside consultant who thought highly of Henoch, to stay away from Henoch because she was "bad news." (J.A. 2271-72; E.A. 62-67, 2277).

Defendants claim that Henoch's alleged decline in job performance resulted from her unhappiness with job changes resulting from deregulation. (Def. Br. at 6). However, this was contradicted by defendants' own witness. (J.A. 2461).

Finally, defendants imply that Delany was let go solely because he was a "victim of the same forces of deregulation" as was Henoch. (Def. Br at 6). This is no more true with Delany than it was with Henoch. As Graziano testified, Delany was asked to submit his resignation in part because of his temper, and that Purolator had "lost confidence in [him]." (J.A. 2958).[20]

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20 Defendants also completely ignore plaintiffs' comparison of the treatment of Delany with Sheehan. Delany was asked to resign; Sheehan was summarily fired.

[25] **CONCLUSION**

For all the foregoing reasons, and those set forth in plaintiffs-appellants' main brief plaintiffs-appellants respectfully request that this Court reverse the decisions below in their entirety, and order certification of the class and entry of judgment in favor of plaintiffs Sheehan and Henoch on their individual, claims or, alternatively, reverse the decisions below and remand the case to the District Court for further proceedings.

Dated: New York, New York
October 27, 1987

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

87-7540

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLREIGEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 87-7540

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

On February 12, 1988, a divided panel of this Court affirmed the judgments below which had denied plaintiffs' motion for class certification and had dismissed the named plaintiffs' individual claims of sex discrimination in salary, assignment, promotion and transfer under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. ("Title VII"). Plaintiffs petition for rehearing, suggesting *en banc* consideration, on the following grounds:

1. The decision in *Sheehan v. Purolator, Inc.*, No. 87-7540, Slip op. (2d Cir. February 12, 1988), erroneously requires plaintiffs to prove the merits of their class claims on a motion for class certification and is, therefore, contrary to **[2]** the Supreme Court decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); and

2. The decision in *Sheehan* misstates the criteria for evaluation of statistical evidence in employment discrimination cases

and is in conflict with the decision of another panel of this Court in *Sobel v. Yeshiva University*, No. 87-7373, slip op. (2d Cir. February 4, 1988).

ARGUMENT

POINT I

IN CONTRAVENTION OF THE SUPREME COURT'S DECISION IN *EISEN V. CARLISLE & JACQUELIN*, THE COURT ERRONEOUSLY REQUIRES PLAINTIFFS TO PROVE THEIR CASE OF DISCRIMINATION AT THE CLASS CERTIFICATION STAGE

In *Sheehan*, this Court affirmed the denial of class certification "on the ground of lack of class-wide proof of an aggrieved class," slip op. at 1660, holding that plaintiffs' statistical studies as well as other evidence did not suffice to meet the requirements of *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).

In *Falcon*, the Supreme Court held that the prerequisites to maintain a class action under Rule 23 of the Federal Rules of Civil Procedure—numerosity, commonality, typicality and adequacy of representation—could not be presumed. 457 U.S. at 158 ("[I]t was error for the District Court to presume that respondent's claim was typical of other claims against petitioner."); *see Rossini v. Ogilvy & Mather,* [3] Inc. 798 F.2d 590, 597 (2d Cir. 1986). The Supreme Court's emphasis in *Falcon* was on so-called across-the-board cases where a single plaintiff was seeking to represent a class of both applicants and employees. *See* 457 U.S. at 158-59. *Falcon* did not overrule or modify the Court's earlier decision in *Eisen v. Carlisle*, 417 U.S. 156 (1974), which held that courts are not to conduct an inquiry into the merits at the class certification stage. *Id.* at 178. The panel's decision in *Sheehan* twists *Falcon* to equate proof of the prerequisites of Rule 23 with proof of the merits.

In *Eisen*, the Supreme Court admonished that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a

suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. The Court quoted Judge Wisdom in concluding that:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

Id. at 178 (quoting *Miller v. Mackey International*, 452 F.2d 424 (5th Cir. 1971)). Similarly, this Court reiterated *Eisen*'s prohibition on an examination of the merits for class certification. *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 570-72 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982). Here, however, the District Court and the panel of this Court not only **[4]** inquired into the merits of plaintiffs' claims, but also required plaintiffs to prove the class claims of discrimination in order to have a class certified.

The significant problem with the the panel's approach is that plaintiffs never had the opportunity to conduct full-fledged discovery on the merits of their class claims, but conducted only limited discovery on class certification issues. Once the Court below denied class certification, discovery was limited to the individual claims. Indeed, during the trial, the District Court, sustained defendants' objections and *sua sponte*, excluded testimony because the Court was "not trying a class action," and, repeatedly commented that the trial was not on the class claims. (*See* J.A. 2522-24; 2592-93; 3089). As Judge Kearse properly observed:

> In finding, however, that the Company had not engaged in sex discrimination against these plaintiffs, the trial court did not mention any of the blatantly sexist written statements endorsed by the Company's top officers. Nor did it mention the testimony of Weibe, or the testimony of Nichols that he dismissed Sheehan's transfer request because she had children, or other evidence that supported plaintiffs' claims that the Company denied them certain job opportunities because they were women. Ordinarily I would say that a trial court need not mention each piece of

> evidence it has considered. But where the trial judge has plainly erred by excluding some relevant proof of discrimination, thinking it was not relevant, I believe the reviewing court should be skeptical, rather than imaginatively generous, in interpreting the trial judge's complete silence as to the considerable amount of evidence of gender bias that is in the record.

[5] Slip Op. at 1672-73.

Thus, under *Eisen*, there was, at a minimum, sufficient proof to demonstrate likely class-wide discrimination; indeed, Judge Kearse found considerable evidence of discrimination. That evidence should have been sufficient for class certification. Instead, in deciding the class certification motion, this Court refers to plaintiffs' failure to adduce "probative evidence to support their claims." Slip op. at 1662 (emphasis added).[1] Similarly, the Court quotes approvingly from a Ninth Circuit decision affirming the lower court and stating that the district judge "was simply unpersuaded." Slip op. at 1663 (quoting *Penk v Oregon School Bd.*, 816 F.2d 458, 465 (9th Cir.), *cert. denied*, 108 S.Ct. 158 (1987)). However, that decision was reached after class-wide discovery and a nine-month trial, not on a motion for class certification. *See Penk*, 816 F.2d at 460.

The Court merges plaintiffs' arguments with respect to the merits of plaintiffs' individual claims and the arguments with respect to class certification. For example, in its discussion of plaintiffs' appeal from the District Court's *class certification* decision, the Court states that "[*a*]*t trial*, appellants relied heavily on their regression analysis." Slip op. at 1660 (emphasis added). In that same discussion, the Court **[6]** frames the issue before the Court as whether a regression with less than all measurable variables can serve to "prove a plaintiff's case." *Id.* at 1661. Yet, it was not plaintiffs' burden to prove their class case in order to obtain class certification. Rather, plaintiffs had to show that the requirements of Rule 23 were met. This Court,

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1 The Court is incorrect on the facts and law in its statement that the case was "analyzed . . . as one of disparate impact, requiring proof of discriminatory motive." Slip op. at 1658. The District Court treated the case as one of disparate treatment. *See* 103 F.R.D. at 647.

however, never addresses plaintiffs' arguments with respect to the District Court's erroneous rulings as to the commonality and typicality requirements—again, because of a "lack of class-wide proof" of an aggrieved class. Slip op. at 1660. *See* Plaintiffs-Appellants' Brief at 26-35.

In this same regard, the cases cited by the Court with respect to plaintiffs' statistical showing on their motion for class classification, *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *Rossini v. Ogilvy & Mather*, 798 F.2d 590 (2d Cir. 1986), all involve the level of proof required to prove discrimination, not the requirements for class certification.[2] In addition, *Teamsters* and *Rossini* address the issue of anecdotal evidence as proof *at trial*. *See Rossini*, 798 F.2d at 604.[3] Applying the standards in those cases to plaintiffs' class certification motion is erroneous because **[7]** plaintiffs never had the opportunity to conduct class-wide discovery which could have provided the anecdotal evidence to bring "the cold numbers convincingly to life." *Teamsters*, 431 U.S. at 339.

The Court's erroneous view of this case is revealed equally by its conclusion that the District Court's class certification decision was "not clearly erroneous," slip op. at 1663, the standard applied to factual findings after trial. Similarly, the cases cited by the Court in upholding the District Court's class certification decision as "plausible in light of the record," slip op. at 1663 (quoting *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 822 F.2d 230, 240 (2d Cir. 1987)), refer to the standard applied to factual findings after trial.

The standard of review for a class certification decision is whether the District Court abused its discretion. *Rossini*, 798 F.2d at 594. The Court does not address the District Court's failure, in light of the evidence adduced at trial, to rule on

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2 As discussed, *infra*, the Court's application of *Bazemore* was erroneous, even as applied to a merits inquiry.

3 The District Court here excluded anecdotal testimony at trial on the ground that it was class-wide proof. (*See* p. 4, *supra*).

plaintiffs' renewed motion for class certification.[4] With respect to the renewed motion, the District [8] Court failed to exercise its discretion at all—which is tantamount to an abuse of that discretion. By failing to articulate, or even address, any of the reasons for the decision on the renewed class certification motion, the District Court cannot be said to have provided any basis for a decision. This Court should not have been generous in interpreting the District Court's silence, especially in the light of the "considerable amount of evidence of gender bias that is in the record." Slip op. at 1673. *See United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981).

[9] **POINT II**

THE COURT MISSTATES THE CRITERIA FOR EVALUATION OF STATISTICAL EVIDENCE IN EMPLOYMENT DISCRIMINATION CASES AND IS IN CONFLICT WITH THE DECISION OF ANOTHER PANEL OF THIS COURT IN *SOBEL V. YESHIVA*

The conclusion of this Court in *Sheehan* that plaintiffs' regression was inadequate proof of discrimination is in direct conflict with the decision of another panel of this Court in *Sobel v. Yeshiva University*, No. 87-7373, slip op. (2d Cir. February 4, 1988).

Despite the fact the plaintiffs introduced a regression analysis showing statistically significant differences between the salaries

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4 This Court's treatment of the evidence plaintiffs offered on their class certification motion compounds the error. For example, the Court's statement that there was evidence from which the fact finder could conclude that the Transportation Manuals were not *in effect* is contrary to the record. The Manuals were issued in 1971, renewed in 1975, and remained in effect until 1983 or 1984. (J.A. 2101-02, 2106; E.A.1). This case was filed in 1981. In addition, the non-discriminatory policies the Court refers to as being in effect at headquarters were simply conclusory EEO statements. As Judge Kearse's dissenting opinion states, the Manuals contained "blatantly sexist written statements endorsed by [Purolator's] top officers." Slip op. at 1672. *Id.* at 1673. Defendants never disputed that these policies were in effect outside of corporate headquarters, which is strong evidence supporting class-wide discrimination.

paid to men and women at Purolator, this Court upheld the District Court's rejection of plaintiffs' statistical proof solely on the ground that the regression analysis did not take into account certain variables. The Court justifies this ruling by stating that "[a]ppellees introduced evidence that these factors indeed *could* explain the disparities." Slip op. at 1661 (emphasis added).[5] That speculation is contrary to the requirements of *Sobel* and *Bazemore*. Under *Sobel* and *Bazemore*, defendants should have been required to produce evidence that the factors they contended plaintiffs excluded from a statistical study *explained* the disparities. When defendants' expert was asked what effect the **[10]** exclusion of the variables would have on the validity of plaintiffs' study, his candid response was: "I don't know." (J.A. 3037).

In *Sobel*, this Court held that *Bazemore* requires "a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis." Slip op. at 1490-91 (citing *Bazemore*, 106 S.Ct. at 3010-11 n.14 and *Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987)). Like the defendant in *Sobel*, (*see Sobel*, slip op. at 1491-92), defendants' here failed to show that accounting for the factors they contended plaintiffs had left out of their regressions actually reduced the apparent wage disparity. Defendants' own expert testified that he could not tell whether including the variables would alter the results of plaintiffs' studies. (J.A. 3037). Defendants' expert, as did the defendant's expert in *Sobel*, "simply criticized plaintiffs' failure to include [variables], offering no reason, in evidence or analysis, for concluding that they correlated with sex and therefore were likely to affect the sex coefficient." *Sobel*, slip op. at 1491.

Nor did defendants' expert submit any studies to rebut plaintiffs' statistical showing. He instead testified about a study he did using a small sample of the population that he had selected. With respect to that limited study, he admitted that "the sample size was not large enough to permit me to draw a **[11]** firm con-

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5 Later in the opinion, this Court erroneously states that "nondiscriminatory variables were omitted that explained the wage disparities." Slip op. 1664. There is no support for this assertion in the record.

clusion about all exempt employees." (J.A. 1072). He testified that the results of his infirm regression "*suggest*[*ed*]" that when all salient variables were controlled for, there is no significant difference between men and women's salaries at Courier." (J.A. 1072) (emphasis added). That mere suggestion, however, is simply not sufficient evidence under *Bazemore* and *Sobel*.

Furthermore, as this Court also ruled in *Sobel*, a defendant must show that the excluded variables are "actual determinants of salary, or at least adequate proxies for productivity." *Sobel*, slip op. at 1493. In this case, defendants' expert conceded he included an amalgam of variables in his limited study that bore no relationship to salaries at Purolator. Thus, for example, he included "years of experience in the armed forces" (J.A. 3131) and "willingness to move." (J.A. 3133). With respect to those variables,[6] he had no idea what relationship, if any, they bore to Purolator, and further never said that he was using them as proxies for productivity (which he obviously was not).

As this Court explained in *Sobel*:

> Yeshiva contended that Sobel had left out several important variables that would represent productivity and, implicitly, reduce the sex coefficient by explaining some of the disparity in salary which plaintiffs' experts had attributed to gender discrimination.
>
> **[12]** With one exception—rank—which will be discussed shortly, Yeshiva did not show that, with these factors accounted for, the apparent gender disparity was reduced. Yeshiva's experts simply criticized plaintiffs' failure to include them, offering no reason, in evidence or analysis, for concluding that they correlated with sex and therefore were likely to affect the sex coefficient. Of course, Yeshiva is free on retrial to seek to show that any regression offered by plaintiffs is inadequate for lack of a given variable, but such an attack should be specific and make a showing of relevance for each particular variable it contends plaintiffs ought to include. Ideally, Yeshiva would seek to do so by offering its own regression that includes

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6 Defendants' expert did not criticize plaintiffs' analysis for excluding those variables, he simply included them in his study without explanation.

> the variable it contends improperly was omitted. *At the first trial, the single regression Yeshiva offered was packed with all of the factors it contended plaintiffs should have included, but it provided the court with no chance to sift through the various factors to determine the weight to be assigned to any of them.*

Sobel, slip op. at 1491-92 (emphasis added). Defendants did the same here. They offered no study comparable to plaintiffs'; instead they offered a truncated sample[7] "packed with all of the factors [they] contended plaintiffs should have included"—and more—"but [they] provided the court with no chance to sift through the various factors to be assigned to any of them." *Sobel*, slip op. at 1492.

In short, defendants simply never met their burden with respect to rebutting plaintiffs' statistics.[8] Under *Sobel* **[13]** and *Bazemore*, plaintiffs' study was sufficient proof of discrimination, or *at a minimum*, when coupled with the sexist policies, the testimony of Weibe, the excluded testimony of Balzano, the testimony of the affirmative action officer, and the admission by Sheehan's supervisor that he considered her motherhood in deciding to dismiss her request for a transfer, plaintiffs' study was sufficient to show that there was a class in need of protection. This Court's conclusion to the contrary should be reconsidered and reversed.

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7 Defendants' expert admitted that "the smaller the sample size the more difficult it is to detect pay differences at any given significance level." (J.A. 3136).

8 Equally applicable here is the panel's detailed discussion in *Sobel* of the mathematical bases for a defendant to show how excluded variables would affect a regression. Purolator's expert never showed that men and women "scored" differently with respect to the excluded variables. *See Sobel* Slip op. at 1492-94. Such an omission is particularly important given the trial testimony that the only qualification for a position at Purolator was a high school diploma and experience. (J.A. 2860). Plaintiffs' variables of age and seniority therefore should have been considered adequate proxy variables for experience, especially in the absence of anything more from the defendants.

[14] **CONCLUSION**

Plaintiffs respectfully request that this appeal be reheard and suggests that such rehearing be held *en banc*.

Dated: New York, New York
February 26, 1988

Respectfully submitted,

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